(20)

No. 04-278
Title: Town of Castle Rock, Colorado, Petitioner
v.
Jessica Gonzales, Individually and as Next Best Friend of Her Deceased Minor Children, Rebecca Gonzales, Katheryn Gonzales, and Leslie Gonzales

Docketed: August 31, 2004
Lower Ct: United States Court of Appeals for the Tenth Circuit
Case Nos.: (01-1053)
Decision Date: April 29, 2004
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~
Jul 14 2004	Application (04A57) to extend the time to file a petition for a writ of certiorari from July 28, 2004 to August 27, 2004, submitted to Justice Breyer.
Jul 20 2004	Application (04A57) granted by Justice Breyer extending the time to file until August 27, 2004.
Aug 27 2004	Petition for a writ of certiorari filed. (Response due September 30, 2004)
Sep 28 2004	Blanket consent to the filing of amicus briefs in support of either party received from counsel for the petitioner and counsel for the respondents.
Sep 29 2004	Brief amicus curiae of Denver Police Protective Association filed.
Sep 29 2004	Brief of respondent Jessica Gonzales, Individually and as Next Best Friend of Her Deceased Minor Children, Rebecca Gonzales, Katheryn Gonzales, and Leslie Gonzales in opposition filed.
Sep 30 2004	Brief amici curiae of International Municipal Lawyers Association, et al. filed.
Oct 13 2004	DISTRIBUTED for Conference of October 29, 2004.
Oct 15 2004	Reply of petitioner Town of Castle Rock, Colorado filed. (Distributed)
Nov 1 2004	Petition GRANTED.
Dec 3 2004	Extension of time within which to file the joint appendix and petitioners's brief on the merits to and including December 23, 2004.
Dec 9 2004	Motion to dispense with printing the joint appendix filed by the parties.
Dec 22 2004	Blanket consent to the filing of amicus briefs in support of both parties received from counsel for the petitioner and counsel for the respondent.
Dec 23 2004	Brief of petitioner Town of Castle Rock, Colorado filed.
Dec 23 2004	Brief amici curiae of Denver Police Protective Association, et al. filed.
Dec 23 2004	Brief amici curiae of International Municipal Lawyers Association, et al. filed.
Dec 23 2004	Brief amicus curiae of United States filed.
Jan 10 2005	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Jan 19 2005	SET FOR ARGUMENT ON Monday, March 21, 2005.
Jan 19 2005	Extension of time within which to file respondents' brief on the merits to and including February 10, 2005.
Jan 28 2005	CIRCULATED.
Feb 9 2005	Brief amici curiae of International Law Scholars, et al. filed. (Distributed)
Feb 10 2005	Brief amicus curiae of National Association of Women Lawyers, et al. filed. (Distributed)
Feb 10 2005	Brief amici curiae of National Network To End Domestic Violence, et al. filed. (Distributed)

Feb 10 2005	Brief amici curiae of ACLU, et al. filed. (Distributed)
Feb 10 2005	Brief amicus curiae of AARP filed. (Distributed)
Feb 10 2005	Brief amici curiae of National Black Police Association, et al. filed. (Distributed)
Feb 10 2005	Brief of respondents Jessica Gonzales, Individually and as Next Best Friend of Her Deceased Minor Children, Rebecca Gonzales, Katheryn Gonzales, and Leslie Gonzales filed. (Distributed)
Feb 10 2005	Brief amici curiae of National Coalition Against Domestic Violence, et al. filed. (Distributed)
Feb 10 2005	Brief amici curiae of Family Violence Prevention Fund, et al. filed. (Distributed)
Feb 10 2005	Brief amici curiae of Peggy Kerns, et al. filed. (Distributed)
Feb 10 2005	Record received from U.S.D.C. Dist. of Colorado. (1 envelope)
Feb 11 2005	Record received from U.S.D.C. -10th Circuit. (1 box)
Feb 16 2005	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Feb 28 2005	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 15 2005	Reply of petitioner Town of Castle Rock, Colorado filed. (Distributed)
Mar 21 2005	Argued. For petitioner: John C. Eastman, Orange, Cal.; and John P. Elwood, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States as amicus curiae.) For respondents: Brian J. Reichel, Broomfield, Colo.

Supreme Court, U.S.
FILED

04 278 AUG 27 2004

OFFICE OF THE CLERK

No. ____

IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHERYN GONZALES, AND LESLIE GONZALES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

THOMAS S. RICE
ERIC M. ZIPORIN
Counsel of Record
Senter Goldfarb & Rice, L.L.C.
P.O. Box 22833
Denver, CO 80222
(303) 320-0509

JOHN C. EASTMAN
c/o Chapman University
School of Law
One University Drive
Orange, CA 92866

ERIK S. JAFFE
Erik S. Jaffe, P.C.
5101 34th Street, NW
Washington D.C. 20008

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether, in conflict with decisions of the Sixth, Seventh, Eighth, and D.C. Circuits, the Tenth Circuit's decision permitting a *procedural* due process claim against a local government for its failure to protect the holder of a partial restraining order from private violence, when the State itself provides no such remedy, so circumvents as to effectively repudiate this Court's holding in *DeShaney* rejecting a similar *substantive* due process claim?

2. If the Fourteenth Amendment's Due Process Clause is read to permit, via its procedural aspects, the same substantive claims already rejected by this Court in *DeShaney*, what kind of process is required for police inaction with respect to a partial restraining order *not* to violate the constitution?

PARTIES TO THE PROCEEDING

Petitioner: Town of Castle Rock, Colorado, a Colorado home rule municipal corporation.

Respondent: Jessica Gonzales, individually and as next friend of her deceased minor children Rebecca Gonzales, Katheryn Gonzales, and Leslie Gonzales.

Other Defendants Below: Aaron Ahlfinger, Robert S. Brink, and Marc Ruisi, current or former members of the Town of Castle Rock Police Department.

Amici Curiae Below: Colorado Municipal League; Colorado Counties, Inc.; and Colorado Association of Chiefs of Police.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES v
OPINIONS BELOW 2
STATEMENT OF JURISDICTION 2
PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS 2
STATEMENT OF the CASE 4
REASONS FOR GRANTING THE WRIT 11

I. By Holding that Castle Rock's Failure to Enforce a Partial Restraining Order Gave Rise to a *Procedural* Due Process Claim, The Tenth Circuit Has Decided an Important Federal Question Left Open in *DeShaney*, and Seriously Undermined *DeShaney*'s Principal Holding in the Process. 14

A. *DeShaney* did not embrace, but merely declined to consider, the procedural due process claim sanctioned by the Tenth Circuit. 14

B. The Tenth Circuit's decision would convert hundreds of procedural mandates into constitutional claims. 15

II. The Tenth Circuit's Decision Is in Conflict with the Decisions of the Sixth, Seventh, Eighth, and D.C. Circuits, All of which Have Rejected Efforts To Use *Procedural* Due Process Claims in Order To Circumvent *DeShaney*'s Bar on Substantive Due Process Claims for a

Municipality's Failure To Protect Against Private Violence.....18

III. The Tenth Circuit's Decision Also Raises Important Issues About the Kind of Process that Would Be, or Possibly Could Be, Due Before a State Actor Fails To Act.....23

CONCLUSION 25

Appendix A: Tenth Circuit *En Banc* Opinion 1a

Appendix B: Supplemental Order On Rehearing.....95a

Appendix C: Order on Rehearing *En Banc* 97a

Appendix D: Tenth Circuit Panel Opinion.....99a

Appendix E: District Court Opinion 113a

Appendix F: Complaint.....124a

TABLE OF AUTHORITIES

Cases

Archie v. *City of Racine*
847 F.2d 1211 (CA7 1988) 9, 11

Balistreri v. *Pacifica Police Dep't*
901 F.2d 696 (CA9 1990) 12

Balistreri v. *Pacifica Police Dep't*
897 F.2d 368 (CA9 1990)
(replacing 855 F.2d 1421 (CA9 1988)).....12

Balistreri v. *Pacifica Police Dep't*
855 F.2d 1421 (CA9 1988) 12

Board of Regents of State Colleges v. *Roth*
408 U.S. 564 (1972) 7, 8, 10

Carnegie-Mellon University v. *Cohill*
484 U.S. 343 (1988) 24

Coffman v. *Wilson Police Dep't*
739 F. Supp. 257 (E.D. Pa. 1990).....12, 18

County of Sacramento v. *Lewis*
523 U.S. 833 (1998) 10

DeShaney v. *Winnebago County Dept. of Soc. Servs.*
489 U.S. 189 (1989) 2, 6, 14

Doe by Fein v. *District of Columbia*
93 F.3d 861 (CADC 1996).....10, 20, 22

Doe by Nelson v. *Milwaukee County*
903 F.2d 499 (CA7 1990).....19, 22, 23

Doe v. *Hennepin County*
858 F.2d 1325 (CA8 1988).....9, 21

Doe v. *Milwaukee County*
903 F.2d 499 (CA7 1990)..... 10-11
Fike v. *United Methodist Children's Home of Va., Inc.*
547 F. Supp. 286 (E.D. Va. 1982)..... 24
Grabowski v. *Brown*
922 F.2d 1097 (CA3 1990)..... 12
Harrill v. *Blount County, Tenn.*
55 F.3d 1123 (CA6 1995)..... 10, 21, 22
Hynson v. *City of Chester Legal Dep't*
864 F.2d 1026 (CA3 1988)..... 12, 13
Jones v. *Union County, Tenn.*
296 F.3d 417 (CA6 2002)..... 10, 12, 13, 20, 22
Mathews v. *Eldridge*
424 U.S. 319 (1976)..... 10
Matthews v. *Pickett County, Tenn.*
996 S.W.2d 162 (Tenn. 1999)..... 10
McKee v. *City of Rockwell*
877 F.2d 409 (CA5 1989)..... 12
Meador v. *Cabinet for Human Res.*
902 F.2d 474 (CA6 1990)..... 18
Morrissey v. *Brewer*
408 U.S. 471 (1972)..... 15
Olim v. *Wakinekona*
461 U.S. 238 (1983)..... 9
Pierce v. *Delta County Dep't of Social Servs.*
119 F. Supp.2d 1139 (D. Colo. 2000)..... 11, 21
Reno v. *Flores*
507 U.S. 292 (1993)..... 10

Ricketts v. *City of Columbia, Missouri*
36 F.3d 775 (CA8 1994)..... 13
Semple v. *City of Moundsville*
963 F. Supp. 1416 (N.D. W.Va. 1997)..... 11, 21
Siddle v. *City of Cambridge*
761 F. Supp. 503 (S.D. Ohio 1991)..... 18
Taylor v. *Ledbetter*
818 F.2d 791 (CA11 1987)..... 18
Thurman v. *City of Torrington*
595 F. Supp. 1521 (D. Conn. 1984)..... 12
United States v. *Munsingwear, Inc.*
340 U.S. 36 (1950)..... 24
Watson v. *City of Kansas City*
857 F.2d 690 (CA10 1988)..... 12

Statutes

28 U.S.C. § 1254(1)..... 2
28 U.S.C. § 1291..... 2
28 U.S.C. § 1331..... 2
28 U.S.C. § 1343..... 2
28 U.S.C. § 2106..... 24
42 U.S.C. § 1983..... 2, 5
750 Ill. Comp. Stat. 60/304..... 15
Ark. Code Ann. § 18-16-507..... 16
C.R.S. § 12-47-301(4)(a)..... 18
C.R.S. § 14-10-108..... 3
C.R.S. § 16-8-115.5..... 18
C.R.S. § 18-6-803.5(3)..... 3, 5, 7

C.R.S. § 24-10-101 15
C.R.S. § 24-10-118 15
D.C. CODE ANN. § 1301.05(e)
(formerly D.C. CODE ANN. § 6-2103(e)) 20
D.C. CODE ANN. § 6-2102(b) 20, 22
D.C. CODE ANN. § 6-2105(a) 20
D.C. Stat. § 22-1321 17
Kan. Rev. Stat. § 189.940 17
La. Rev. Stat. § 28:53 17
Mass. Gen. Laws. ch. 209A, § 7 15
Mass. Gen. L. Ann. 111C § 1 17
Me. Rev. Stat. Ann. tit. 7 § 3906-B(11) 15
Minn. Laws § 518B.01(e) 15
Minn. Stat. Ann. § 626.556 21
N.D. Stat § 4-24-13 17
N.H. Rev. Stat. § 540:13-c 16
N.J. Stat. Ann. § 2C:25-23 (West Supp. 1992) 16
N.J. Stat. Ann. § 2C:25-7 (1981) 16
N.J. Stat. Ann. § 9:6-8.18 15
Ore. Rev. Stat. § 133.055(2)(a) 15
Tenn. Code. Ann. § 36-3-611(a)(2) 16
Virgin Islands Code § 407 16
Wis. Stat. Ann. § 48.981(3)(c) 19, 22
Wis. Stat. Ann. § 48.981(3)(c)(2)(a) 19

Other Authorities

Caitlin E. Borgmann, *Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect DeShaney?* 65 N.Y.U. L. Rev. 1280 (1990) 11, 12

Developments in the Law: Legal Responses to Domestic Violence, Part IV, 106 HARV. L. REV. 1551 (May 1993) 16

Helen Rubenstein Holden, Comment, *Does the Legal System Batter Women? Vindicating Battered Women's Constitutional Rights to Adequate Police Protection*, 21 Ariz. St. L.J. 705 (1989) 12

James T. R. Jones, *Battered Spouses' Section 1983 Damage Actions Against the Unresponsive Police After DeShaney*, 93 W. Va. L. Rev. 251 (1991) 11, 14

No. ____

IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHERYN GONZALES, AND LESLIE GONZALES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Town of Castle Rock, Colorado ("Castle Rock")[1] respectfully requests that a writ of certiorari issue to review the judgment and opinion of the *en banc* United States Court of Appeals for the Tenth Circuit entered in this case. The Tenth Circuit, in conflict with four other Circuits,

[1] The complaint and decisions below erroneously refer to petitioner as "City of Castle Rock, Colorado." "Town of Castle Rock, Colorado" is the correct name of the municipal corporation.

permitted a *procedural* due process claim premised on a local government's failure to protect against private violence, despite the fact that this Court in *DeShaney* v. *Winnebago County Dep't. of Soc. Servs.*, 489 U.S. 189 (1989), has already refused to permit *substantive* due process claims in similar factual circumstances.

OPINIONS BELOW

The opinion of the court of appeals is reported at 366 F.3d 1093 (CA10 2004) (*en banc*) (Petitioners' Appending ("Pet. App.") at 1a-94a). The panel opinion of the court of appeals is reported at 307 F.3d 1258 (CA10 2002) (Pet. App. at 99a-112a). The order of the district court dismissing the complaint with prejudice is unreported, but is reproduced at Pet. App. 124a-130a.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Tenth Circuit, sitting *en banc*, was entered on April 29, 2004 (Pet. App. 1a). A timely request for extension, filed on July 14, 2004, was granted by Justice Breyer on July 20, 2004, extending the time in which to file this petition until August 27, 2004. The jurisdiction of this Court is proper under 28 U.S.C. § 1254(1). Jurisdiction in the court of appeals was proper under 28 U.S.C. § 1291, and jurisdiction in the district court was proper under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment provides:

> No State shall . . . deprive any person of life, liberty or property, without due process of law . . . .

Section 14-10-108 of the Colorado Revised Statutes provides, in relevant part:

> (1) In a proceeding for dissolution of marriage, . . . (2) . . . either party may request the court to issue a temporary injunction: . . . (b) Enjoining a party from molesting or disturbing the peace of the other party or of any child; . . . .

Section 18-6-803.5(3) of the Colorado Revised Statutes provides, in relevant part:

> (a) Whenever a protection order is issued, the protected person shall be provided with a copy of such order. A peace officer shall use every reasonable means to enforce a protection order.
>
> (b) A peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that:
>
> (I) The restrained person has violated or attempted to violate any provision of a protection order; and
>
> (II) The restrained person has been properly served with a copy of the protection order or the restrained person has received actual notice of the existence and substance of such order.
>
> (c) In making the probable cause determination described in paragraph (b) of this subsection (3), a peace officer shall assume that the information received from the registry is accurate. A peace officer shall enforce a valid protection order whether or not there is a record of the protection order in the registry.

(d) The arrest and detention of a restrained person is governed by applicable constitutional and applicable state rules of criminal procedure. The arrested person shall be removed from the scene of the arrest and shall be taken to the peace officer's station for booking, whereupon the arrested person may be held or released in accordance with the adopted bonding schedules for the jurisdiction in which the arrest is made. The law enforcement agency or any other locally designated agency shall make all reasonable efforts to contact the protected party upon the arrest of the restrained person. The prosecuting attorney shall present any available arrest affidavits and the criminal history of the restrained person to the court at the time of the first appearance of the restrained person before the court.

(e) The arresting agency arresting the restrained person shall forward to the issuing court a copy of such agency's report, a list of witnesses to the violation, and, if applicable, a list of any charges filed or requested against the restrained person. The agency shall give a copy of the agency's report, witness list, and charging list to the protected party. The agency shall delete the address and telephone number of a witness from the list sent to the court upon request of such witness, and such address and telephone number shall not thereafter be made available to any person, except law enforcement officials and the prosecuting agency, without order of the court.

STATEMENT OF THE CASE

In *DeShaney*, this Court held that the substantive component of the Due Process Clause of the Fourteenth Amendment did not provide a cause of action against state and local governments and government officials for failure to protect

individuals from the violent acts of other private individuals (other than under special circumstances not at issue here). Nevertheless, on June 23, 2000, Respondent Jessica Gonzales brought such a suit in the United States District Court for the District of Colorado against Petitioner Town of Castle Rock and three of its police officers (collectively, "Castle Rock defendants"), seeking $30 million in compensatory damages (as well as punitive damages and attorneys fees) from the Castle Rock defendants after her three children were tragically murdered by her then-estranged husband, Simon Gonzales. Pet. App. 129a.

At the conclusion of their state-court divorce proceedings, Mr. Gonzales had been issued a perfunctory, standard-form partial restraining order directing him to avoid contact with Ms. Gonzales and her children other than during his authorized "parenting time" every other weekend, for two weeks during the summer, and during a pre-arranged, advance notice mid-week dinner visit. Complaint ¶ 9 (Pet. App. 125a). Ms. Gonzales contended in her federal complaint that the partial restraining order, together with Colorado Revised Statutes § 18-6-803.5(3), bestowed upon her and her children a "property right" to police protection, and that the failure of Castle Rock police officers to protect her children (by arresting Mr. Gonzales after Ms. Gonzales informed the police that he had taken the children around dinner-time on a Tuesday evening) "constituted a denial of the due process rights of [Ms. Gonzales] and the three children in violation of the Due Process Clause of the Fourteenth Amendment . . . and 42 U.S.C. § 1983." Complaint ¶¶ 18, 20 (Pet. App. 128a).[2]

---

[2] Curiously, Ms. Gonzales did not allege in her complaint that she ever notified the police that Mr. Gonzales was actually in violation of the restraining order. She alleged only that Mr. Gonzales had taken the children mid-week around dinner time without her permission. Complaint ¶ 10 (Pet. App. 126a). She did not allege that she had informed the police that she had not given her permission for the dinner-time visit, but simply

The Castle Rock defendants moved to dismiss the complaint, contending that it failed to state a claim, that the individual police officers were entitled to qualified immunity, and that Ms. Gonzales had not alleged facts sufficient to establish municipal liability by the Town of Castle Rock. Pet. App. 116a. After briefing and a hearing, the district court (Daniel, J.) dismissed the case with prejudice for failure to state a claim. Pet. App. 123a.

Although Ms. Gonzales had only generically alleged a violation of her Due Process rights, Complaint ¶ 20 (Pet. App. 128a), the district court treated the complaint as having alleged violations of both the substantive and procedural components of the Due Process Clause, Pet. App. 117a, 120a. The court dismissed the substantive Due Process claim, correctly holding that, under *DeShaney*, a State's failure to protect an individual from private violence does not violate substantive due process absent circumstances not applicable in this case. Pet. App. 119a.

Recognizing that this Court's holding in *DeShaney* was limited to the substantive component of the Due Process Clause, Pet. App. 120a n.2 (citing *DeShaney*, 489 U.S., at 195 n.2), the district court separately considered whether Ms. Gonzales's complaint raised a procedural due process claim, namely, whether Castle Rock, by failing to enforce the partial restraining order as specified by state law, deprived her of a property interest in police protection without proper procedure, Pet. App. 120a. Finding that the enforcement obligations contained in the Colorado statute arise only upon a finding of probable cause by the police, the district court held that the Ms. Gonzales did not have a protectable property interest and that here complaint therefore did not allege facts sufficient to support a violation of the procedural component of the Due Process Clause. Pet. App. 122a.

alleged that she showed to the police the restraining order, which expressly allowed mid-week dinner visits. Complaint ¶¶ 9, 11-12 (Pet. App. 125a, 126a). Based on these allegations, the police might reasonably have believed that Mr. Gonzales was not in violation of the order, either because he had not been served with it, or because he had permission for the Tuesday dinner visit, or because Ms. Gonzales had, contrary to the terms of the restraining order (see Pet. App. 92a), unreasonably denied permission for a mid-week dinner visit.

On timely appeal after final judgment was entered, a panel of the United States Court of Appeals for the Tenth Circuit (Seymour, J., joined by McWilliams and Gibson,[3] JJ.) agreed with the district court that *DeShaney* barred Ms. Gonzales's substantive due process claim, but reversed the district court's holding that the procedural due process claim was likewise barred. Pet. App. 106a. Relying on the fact that the procedural due process claims had technically been left unaddressed in *DeShaney*, and distinguishing the decisions of two other circuit courts of appeals that had refused to permit *DeShaney* to be circumvented by the simple expedient of recasting substantive due process claims in procedural due process garb, the panel held that the use of the mandatory "shall" in Colorado Revised Statutes § 18-6-803.5(3) gave Ms. Gonzales an "entitlement" to police protective services that enjoyed procedural due process protection against state deprivation under *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972). Pet. App. 106a-111a.

The Tenth Circuit granted the Castle Rock defendants' petition for rehearing *en banc* and ordered additional briefing to address "1) whether CRS 18-6-803.5(3) in conjunction with the restraining order issued by the Colorado court created a property interest entitled to due process protection and, 2) if so, what process was due." Pet. App. 98a. After reargument, a closely-divided, 6-5 *en banc* court followed the

[3] Hon. John R. Gibson, Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

panel's lead and reversed the district court's dismissal of Ms. Gonzales's procedural due process claim.[4]

Judge Seymour, writing for the 6-member *en banc* majority, rebuffed Castle Rock's contention that the panel's decision had in effect "carved out an exception contrary to *DeShaney* and the general rule that the state does not have an affirmative duty to protect individuals from private third parties," Pet. App. 9a, holding instead that the partial restraining order, coupled with the statutory enforcement mechanism, conferred on Ms. Gonzales and her daughters "an interest in a specific benefit to which [they had] 'a legitimate claim of entitlement,'" Pet. App. 13a (quoting *Roth*, 408 U.S., at 577). Relying on two district court decisions and "[s]omewhat analogous cases from the Sixth and Eleventh Circuits," and rejecting contrary holdings from the Sixth, Seventh, and D.C. Circuits, Judge Seymour then held that Castle Rock's failure to afford Ms. Gonzales "an appropriate level of process" before failing to protect Ms. Gonzales's children from the private violence of her estranged husband and their father violated Ms. Gonzales's procedural due process rights, thereby conferring upon Ms. Gonzales a federal constitutional remedy against Castle Rock. Pet. App. 10a, 30a, 42a-43a. Procedural due process required Castle Rock to afford notice and a hearing to Ms. Gonzales before it failed to enforce the partial restraining order that had been issued to Mr. Gonzales, held Judge Seymour. Pet. App. 32a. Judge Seymour also recognized, however, that because no "reasonable officer would have known that a restraining order, coupled with a statute mandating its enforcement, would create a

---

[4] The *en banc* court was not asked to address the district court's dismissal of Ms. Gonzales's substantive due process claim and the panel's affirmance of that aspect of the district court's holding, so the panel decision affirming dismissal remains undisturbed. Pet. App. 9a n. 3. Thus, any challenge to *DeShaney*'s substantive due process holding has been waived and is not an issue in this case.

constitutionally protected property interest," the individual police officers (though not the Town of Castle Rock itself) were entitled to qualified immunity. Pet. App. 43a.

Four separate opinions were filed by the five dissenting judges.

Judge Kelly, joined by Chief Judge Tacha and Judge O'Brien, thought it "improbable . . . that Ms. Gonzales sought only a hearing on the decision not to enforce the protective order"—the procedural due process claim allowed by the majority—"rather than enforcement itself"—the substantive due process claim unanimously rejected by the court per *DeShaney*. Pet. App. 46a. Nevertheless, he considered and rejected the procedural due process claim, noting that "[i]t has always been the law that mere procedure contained in a statute does not create a property interest—were it otherwise every statute prescribing procedure would confer procedural due process rights." Pet. App. 48a (citing *Olim* v. *Wakinekona*, 461 U.S. 238, 250-51 (1983)). He found that the Colorado statute, viewed as a whole, did not mandate a particular result and therefore did not create a protectable property interest or give rise to a procedural due process claim. Pet. App. 49a. He found the majority's decision to the contrary to be in conflict with, among other cases, the Eighth Circuit's decision in *Doe* v. *Hennepin County*, 858 F.2d 1325, 1328 (CA8 1988), and he found the majority's insistence that Castle Rock should have afforded notice and a hearing to Ms. Gonzales before failing to enforce the protective order an "utter impracticality" at odds with the *en banc* decision of the Seventh Circuit in *Archie* v. *City of Racine*, 847 F.2d 1211, 1217 (CA7 1988) (*en banc*). Pet. App. 51a, 58a.

Judge McConnell, joined by Chief Judge Tacha and Judges Kelly and O'Brien, dissented to note that even if the restraining order coupled with the Colorado statute created a property interest, Ms. Gonzales's complaint raised only a substantive and not a procedural due process claim. "Only

when a plaintiff asserts that government action is procedurally unfair—usually for lack of a hearing—does the balancing test of *Mathews* v. *Eldridge*, 424 U.S. 319, 333-35 (1976), invoked by the majority [rather than the more stringent 'shocks the conscience' test of *County of Sacramento* v. *Lewis*, 523 U.S. 833 (1998)] . . . apply," wrote Judge McConnell, "yet Ms. Gonzales's complaint contains no reference to procedural issues in any form." Pet. App. 60a. He believed that the majority's holding to the contrary was at odds with *Lewis*, 523 U.S. at 846, and that the substantive relief sought by Ms. Gonzales was "in marked contrast" to the procedural relief sought in "the Supreme Court's procedural due process cases, on which the majority relie[d]." Pet. App. 63a (*citing*, *e.g.*, *Roth*, 408 U.S. 564 (1972)). Significantly, Judge McConnell noted that "[i]f the majority is correct, it will always be possible for plaintiffs to recharacterize their substantive due process claims against arbitrary action by executive officials as 'procedural due process' claims, thus avoiding the Supreme Court's exacting 'shocks the conscience' test and getting, instead, the balancing test of *Mathews*"—a maneuver rejected by this Court in *Reno* v. *Flores*, 507 U.S. 292, 308 (1993). Pet. App. 65a.

Judge O'Brien, joined by Chief Judge Tacha and Judge Kelly, stated in his dissenting opinion that the majority's decision left the Tenth Circuit "both adventurous and alone, dramatically separated from other circuits." Pet. App. 67a. He noted that the majority's decision ignored the guiding principles announced in *DeShaney* and was in conflict with decisions from the Sixth, Seventh, and D.C. Circuits as well as the Supreme Court of Tennessee, the District of Colorado, and the Northern District of West Virginia. Pet. App. 67a.[5]

---

[5] *Citing Jones* v. *Union County, Tenn.*, 296 F.3d 417, 429 (CA6 2002); *Matthews* v. *Pickett County, Tenn.*, 996 S.W.2d 162 (Tenn. 1999); *Doe by Fein* v. *District of Columbia*, 93 F.3d 861 (CADC 1996); *Harrill* v. *Blount County, Tenn.*, 55 F.3d 1123, 1125 (CA6 1995); *Doe* v. *Milwaukee County*, 903 F.2d 499 (CA7 1990); *Archie* v. *Racine*, 847 F.2d 1211 (CA7 1988); *Pierce* v. *Delta County Dep't of Social Servs.*, 119 F. Supp.2d 1139 (D. Colo. 2000); *Semple* v. *City of Moundsville*, 963 F. Supp. 1416 (N.D. W.Va. 1997).

Judge Hartz, joined by Chief Judge Tacha and Judge Kelly, also dissented to caution courts against reading "full enforcement" statutes such as the Colorado statute at issue here too literally. Referencing the classic work on the subject by Professor Kenneth Culp Davis, Police Discretion, he noted that even "full enforcement" statutes "permit the exercise of police discretion regarding how much, and even whether, to enforce particular criminal statutes." Pet. App. 92a. Finally, he noted that even if Colorado's statute could be read to confer on Ms. Gonzales procedural due process rights in connection with a decision whether to enforce the partial restraining order, she was given all that *procedural* due process could require under the circumstances: an opportunity to present evidence of the violation of the order and to argue why an arrest was proper. Pet. App. 94a. To hold otherwise, as the majority did, was to convert the procedural due process claim into a substantive due process claim (contrary to *DeShaney*).

REASONS FOR GRANTING THE WRIT

Ever since this Court's decision in *DeShaney* holding that a State's failure to protect individuals from private violence did not infringe *substantive* due process rights, advocates for domestic violence victims have been trying to find a way to pigeon-hole substantive claims for government's failure to protect into one of the exceptions suggested in *DeShaney*.[6] They have, for example, unsuccessfully tried to es-

---

[6] *See, e.g.*, James T. R. Jones, *Battered Spouses' Section 1983 Damage Actions Against the Unresponsive Police After DeShaney*, 93 W. VA. L. REV. 251, 261-65 (1991); Caitlin E. Borgmann, *Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect DeShaney?*, 65 N.Y.U. L. REV. 1280, 1304-07 (1990).

tablish that every holder of a restraining order was in a "special relationship" with the government akin to that of prison inmates or institutionalized persons, which conferred on them a substantive due process entitlement to protective services.[7]

They have also tried to establish, relying on footnote 3 in the *DeShaney* opinion, that a State's failure adequately to enforce restraining orders violated Equal Protection guarantees.[8] Some courts have rejected such claims outright.[9] Others have required evidence not only that the government had a policy or custom of treating domestic violence victims less favorably than victims of other violence, but that discrimination against women was a motivating factor for the policy or custom, before the court would subject the policy to the heightened scrutiny applicable to gender classifications.[10]

The latest strategy has been to claim that mandatory enforcement language in restraining orders and/or the statutes directing enforcement of such orders creates a property right in protective services, such that a State's failure to enforce the restraining order fully or adequately without notice or a hearing violates *procedural* due process rights. Although most courts to have considered the issue have recognized such claims for what they are—yet another attempt to circumvent *DeShaney*—two district courts and the *en banc* Court of Appeals for the Tenth Circuit in the present case have now given their sanction to such claims, severely undermining *DeShaney* in the process.

Certiorari is warranted here for several significant reasons. First, as described in Part I below, the Tenth Circuit has decided an important issue of federal constitutional law that was expressly left open by this Court's decision in *DeShaney*, and did so in a way that severely undermines the guiding principles of *DeShaney* itself, with potentially devastating consequences for municipal governments throughout the Tenth Circuit. S.Ct. Rule 10(c). Second, as described in Part II below, the Tenth Circuit's decision is in conflict with the decisions of several other circuit courts, as the majority opinion itself in part recognized. S.Ct. Rule 10(a). Third, as discussed in Part III, the Tenth Circuit's decision has opened up a hornets' nest of issues with respect to the kind of process that will now be required before a state agency *fails* to act in any particular case. S.Ct. Rule 10(c).

---

[7] *See, e.g., Jones* v. *Union County, Tenn.*, 296 F.3d 417, 428 (CA6 2002) (rejecting effort to "circumvent" *DeShaney* via "special relationship" exception); *Grabowski* v. *Brown*, 922 F.2d 1097, 1114 (CA3 1990) (rejecting the plaintiff's claim that New Jersey's Domestic Violence Act created a relationship "akin to custody" between herself and police officers); *see generally* Helen Rubenstein Holden, Comment, *Does the Legal System Batter Women? Vindicating Battered Women's Constitutional Rights to Adequate Police Protection*, 21 Ariz. St. L.J. 705, 714-18 (1989); Borgmann, 65 N.Y.U. L. REV., at 1304-07. The Ninth Circuit recognized a "special relationship" claim in *Balistreri* v. *Pacifica Police Dep't*, 855 F.2d 1421, 1425 (CA9 1988), but withdrew and amended the opinion to reject the claim in the wake of *DeShaney*. *Balistreri* v. *Pacifica Police Dep't*, 901 F.2d 696, 700 (CA9 1990).

[8] *See, e.g., Coffman* v. *Wilson Police Dep't.*, 739 F. Supp. 257, 262 n.5 (E.D. Pa. 1990) (citing *Hynson* v. *City of Chester, Legal Dep't*, 864 F.2d 1026 (3d Cir.1988); *Balistreri* v. *Pacifica Police Dep't*, 897 F.2d 368 (CA9 1990) (*replacing* 855 F.2d 1421 (CA9 1988)); *Watson* v. *City of Kansas City*, 857 F.2d 690 (CA10 1988); *Thurman* v. *City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984);

[9] *See, e.g., McKee* v. *City of Rockwall*, 877 F.2d 409, 413 (CA5 1989) (holding that, although *DeShaney* did not directly bar an equal protection claim for failure to protect, it "is nonetheless relevant" to equal protection analysis because plaintiffs cannot "circumvent ... *DeShaney* by converting every Due Process claim into an Equal Protection claim via an allegation that state officers exercised their discretion to act in one incident but not in another").

[10] *See, e.g., Jones* v. *Union County, Tenn.*, 296 F.3d 417, 426-27 (CA6 2002) (citing *Hynson* v. *City of Chester, Legal Dep't*, 864 F.2d 1026, 1031 (CA3 1988); *Ricketts* v. *City of Columbia, Missouri*, 36 F.3d 775, 779 (CA8 1994) (citing *Hynson*).

Any one of these grounds is sufficient to warrant this Court's review; collectively, they provide a compelling case for certiorari. Indeed, the present circumstances are nearly identical to those which prevailed when this Court granted certiorari in *DeShaney* itself. *See* 489 U.S. at 194 ("Because of the inconsistent approaches taken by the lower courts in determining when, if ever, the failure of a state or local governmental entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights . . . and the importance of the issue to the administration of state and local governments, we granted certiorari.").

I. By Holding that Castle Rock's Failure to Enforce a Partial Restraining Order Gave Rise to a *Procedural* Due Process Claim, The Tenth Circuit Has Decided an Important Federal Question Left Open in *DeShaney*, and Seriously Undermined *DeShaney*'s Principal Holding in the Process.

A. *DeShaney* did not embrace, but merely declined to consider, the procedural due process claim sanctioned by the Tenth Circuit.

In footnote 2 of its opinion in *DeShaney*, this Court declined to consider whether a state statute might provide individuals with an "entitlement" to receive governmental protective services that would enjoy procedural due process protection under *Roth*. *DeShaney*, 489 U.S., at 195 n.2. One legal scholar grappling with the import of that footnote has contended that this Court therefore "[be]grudging[ly]" left open the possibility that a State statute might create procedural due process rights in protective services provided by the State, such that a State's inaction would violate the Due Process Clause.[11] Although petitioners believe (and will contend in their merits brief) that, by citing *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972), this Court in *DeShaney* properly suggested a reluctance to take that step—at least outside the context of willful and wanton conduct for which Colorado law already provides a remedy[12]—the Tenth Circuit has read footnote 2 in *DeShaney* as authorizing an exception large enough to swallow the *DeShaney* rule itself. Whether or not the Tenth Circuit is correct, it surely has decided an important question of federal constitutional law that warrants this Court's attention.

[11] Jones, *Battered Spouses*, *supra* n. 6, at 308.

B. The Tenth Circuit's decision would convert hundreds of procedural mandates into constitutional claims.

Under the Tenth Circuit's reasoning, countless other domestic abuse statutes already on the books will give rise to constitutional claims asserting procedural due process violations.[13] If allowed to stand, therefore, the Tenth Circuit's de-

[12] Under the Colorado Governmental Immunity Act, §§ 24-10-101, *et seq.*, 7B C.R.S. (2003), a party claiming injury can bring a tort claim against a law enforcement officer by alleging "willful and wanton" conduct. *See* Colo. Rev. Stat. § 24-10-118 (2003).

[13] *See, e.g.*, 750 Ill. Comp. Stat. 60/304 ("Whenever a law enforcement officer has reason to believe that a person has been abused, neglected, or exploited by a family or household member, the officer shall immediately use all reasonable means to prevent further abuse, neglect, or exploitation"); Maine Animal Welfare Act, Me. Rev. Stat. Ann. tit. 7 § 3906-B(11) ("The commissioner, in cooperation with animal control officers, *shall* investigate complaints of cruelty to animals and enforce cruelty-to-animal laws"); Mass. Gen. Laws ch. 209A, § 7 ("Law enforcement officers *shall* use every reasonable means to enforce . . . abuse prevention orders"); Minn. Laws § 518B.01(e) ("A peace officer *shall* arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated [a domestic abuse protection] order"); N.J. Stat. Ann. § 9:6-8.18 ("The Bureau of Children's Services . . . *shall* upon receipt of [a] report [of suspicious injury to a child], take action to insure the safety of the child"); Ore. Rev. Stat. § 133.055(2)(a) ("when a peace officer responds to an incident of domestic disturbance

cision would render *DeShaney* a dead letter and could bankrupt municipal governments in the process, given the inevitability of less-than-perfect enforcement. Alternatively, the decision could result in a weakening of state statutes for which victims' advocates have lobbied. *Compare* N.J. Stat. Ann. § 2C:25-7 (1981) (repealed 1982), with *id.* § 2C:25-23 (West Supp. 1992); *see also Developments in the Law: Legal Responses to Domestic Violence, Part IV*, 106 HARV. L. REV. 1551, 1564 n. 88 (May 1993) (New Jersey's action "may well be an example of how the prospect of the enforcement of entitlement rights through liability suits may in fact deter the kind of progressive legislation that battered women seek"). Federal courts should not lay such a heavy hand on evolving state efforts to address such quintessentially local issues of crime and violence.

Nor is the Tenth Circuit's reasoning limited to domestic violence statutes. A police officer's failure to eject a trespasser would give rise to constitutional liability in the face of mandatory statutory language coupled with a specific ejectment order.[14] Police discretion in enforcing noise ordinances

---

and has probable cause to believe that an assault has occurred between family or household members, . . . the officer *shall* arrest and take into custody the alleged assailant"); Tenn. Code Ann. § 36-3-611(a)(2) ("Any law enforcement officer *shall* arrest the respondent without a warrant if . . . [t]he officer has reasonable cause to believe the respondent has violated or is in violation of an order for protection") (emphasis added throughout).

[14] *See, e.g.*, Ark. Code Ann. § 18-16-507 ("Upon receipt of a writ of ejectment from the clerk of the circuit court, the sheriff or police chief *shall immediately* proceed to execute the writ in the specific manner described in this section and, if necessary, ultimately by ejecting from the property described in the writ the defendant"); N.H. Rev. Stat. § 540:13-c ("a writ of possession shall be issued and the sheriff *shall evict* the tenant as soon as possible"); Virgin Islands Code § 407 ("In the event any person is illegally on the property of the hotel, the hotelkeeper may solicit the aid of any member of the police, and it *shall* be the obligation of every member of the Police Force, at the request of the hotelkeeper, to evict immediately such person from the property of the hotel and with the use of force no greater than the circumstances require").

would be replaced by a regime of constitutional liability for failure to enforce.[15] A State's failure to enforce patent protection statutes would give rise to claims of constitutional violations.[16] And countless statutory mandates describing the rules by which police, fire fighters, and ambulance drivers undertake their jobs would result in constitutional claims for any shortcomings.[17]

Judge O'Brien aptly described in his dissenting opinion below the new order that will prevail for municipal liability if the Tenth Circuit's decision is allowed to stand. "Qualified immunity has now been substantially eroded, if not eliminated," he said, "in all cases based upon mandatory and directive language contained in a statute." Pet. App. 81a. "Almost any such case, cleverly pled, will survive a motion to dismiss and quite possibly a motion for summary judgment," he added, noting the "rippling effects" that will flow from

---

[15] *See, e.g.*, D.C. Stat. § 22-1321 ("Whoever, with intent to provoke a breach of the peace, . . . acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others, . . . shall be fined not more than $250 or imprisoned not more than 90 days, or both");

[16] *See* N.D. Stat. § 4-24-13 ("Within sixty days from the date [samples from genetically-engineered crops] are taken, an independent laboratory shall conduct all tests to determine whether patent infringement has occurred").

[17] *See, e.g.*, Kan. Rev. Stat. § 189.940 ("upon approaching any red light . . . [the driver of an emergency vehicle] *shall* slow down as necessary for safety to traffic"); La. Rev. Stat. § 28:53 ("If necessary, peace officers shall apprehend and transport . . . a [substance abuse] patient on whom an emergency certificate has been completed to a treatment facility at the request of either the director of the facility, the certifying physician or psychologist, the patient's next of kin, the patient's curator, or the agency legally responsible for his welfare"); Mass. Gen. L. Ann. 111C § 1 ("A[n emergency medical services] service zone provider shall be staffed and equipped to be available for primary ambulance service or EMS first response 24 hours a day, seven days a week").

the fact that "[w]ith the loss of immunity from liability goes the loss of immunity from suit." *Id.* Judge O'Brien rhetorically wondered, for example, whether the Superintendent of the Colorado Mental Health Institute and the district attorney would be liable if, after having probable cause that a conditionally-released mentally ill patient was no longer eligible for conditional release, the patient caused some injury, or whether police departments would be liable to a victim of a drunk or underage driver for failing to ensure that no alcoholic beverages were ever sold by an unlicensed vendor—the relevant Colorado statutes contain the same kind of mandatory language found in the statute at issue here. *Id.* at 81a n.12 (citing COLO. REV. STAT. §§ 16-8-115.5; 12-47-301(4)(a)).

The magnitude of the fallout from the Tenth Circuit's decision alone warrants this Court's review.

II. The Tenth Circuit's Decision Is in Conflict with the Decisions of the Sixth, Seventh, Eighth, and D.C. Circuits, All of which Have Rejected Efforts To Use *Procedural* Due Process Claims in Order To Circumvent *DeShaney*'s Bar on Substantive Due Process Claims for a Municipality's Failure To Protect Against Private Violence.

The Tenth Circuit relied upon two district court decisions, *Coffman* v. *Wilson Police Dep't.*, 739 F. Supp. 257 (E.D. Pa. 1990); and *Siddle* v. *City of Cambridge*, 761 F. Supp. 503 (S.D. Ohio 1991), and "[s]omewhat analogous cases from the Sixth and Eleventh Circuits," *Meador* v. *Cabinet for Human Res.*, 902 F.2d 474, 476 (CA6 1990); *Taylor* v. *Ledbetter*, 818 F.2d 791, 799 (CA11 1987) (*en banc*), in reaching its holding that a claim against the State for failure to protect against private violence was a permissible circumvention of *DeShaney* if phrased as a procedural due process claim rather than a substantive due process claim. The Tenth Circuit's decision stands in stark contrast

with decisions from the Sixth, Seventh and D.C. Circuits specifically referenced by the Tenth Circuit majority, as well as decisions from the Eighth Circuit and the District of West Virginia in the Fourth Circuit referenced by one or more of the Tenth Circuit dissenters.

In *Doe by Nelson* v. *Milwaukee County*, 903 F.2d 499 (CA7 1990), the Seventh Circuit, in an opinion by Judge Easterbrook, considered *and rejected* the identical procedural due process claim successfully pressed before the Tenth Circuit here. Wisconsin law mandated that the county "*shall* . . . initiate a diligent investigation" within 24 hours of receiving a report of child sexual abuse, "*shall*" conduct the investigation in accord with established standards, and "*shall* include observation of or an interview with the child, or both . . . ." *Id.* at 501 n.3 (quoting Wisc. Stat. § 48.981(3)(c) (emphasis added)). Where such investigation leads to a determination that the child required immediate protection, Wisconsin law provided that the investigator "shall take the child into custody . . . ." Wisc. Stat. Ann. § 48.981(3)(c)(2)(a). After the Milwaukee County department of child protective services failed to conduct the required investigation and further child abuse occurred by the custodial mother's live-in boyfriend, the child's natural father brought suit against the county alleging, *inter alia*, violations of the Due Process Clause. Specifically, as the Seventh Circuit noted, "[f]aced with the obstacle posed by *DeShaney* to their substantive due process challenge, the Does have attempted to assert a violation of their *procedural* due process rights." 903 F.2d, at 502. The Seventh Circuit rejected the Does' attempt to circumvent *DeShaney*, both because of the "elusiveness of the Does' claimed entitlement"—essentially a claim for procedure before being deprived of procedure—and because it could not conceive of any process that "could possibly suffice to prevent the wrongful 'deprivation' of an investigation that [was] supposed to be accomplished within 24 hours of the filing of the report." *Id.* at 504. The Court realized that if such claims

were allowed, fire departments would "be required to hold a hearing before failing to appear at a reported blaze, lest it run afoul of the Fourteenth Amendment," and that "[s]uch a rule would trivialize the Constitution . . . ." *Id.* at 504-05.

The D.C. Circuit reached the same conclusion six years later in *Doe by Fein* v. *District of Columbia*, 93 F.3d 861 (CADC 1996). The District of Columbia Prevention of Child Abuse and Neglect Act of 1977, D.C. CODE ANN. §§ 6-2102(b) & 6-2105(a), provided that the Child Family Services Division ("CFSD") "*shall* commence an investigation of all reports alleging neglect other than abuse within 24 hours of the receipt of the report" and required the CFSD to request that the police remove a child where the investigation revealed that such was required and there was insufficient time to petition for removal. 93 F.3d, at 866, 867 n.8 (emphasis added). For their part, the police "shall take such steps as are necessary to safeguard the child . . . ." D.C. CODE ANN. § 1301.05(e) (formerly D.C. CODE ANN. § 6-2103(e)). Nevertheless, the Court rejected the procedural due process claim as "severely flawed." *Id.* at 868. "[S]tate-created *procedures* do not create" an entitlement protected by the Due Process Clause, held the Court, unless the plaintiff could "show that the procedures that the [CFSD] allegedly failed to follow were enacted pursuant to a substantive constitutional obligation to protect [the plaintiff] from abuse or neglect"—a showing foreclosed by *DeShaney*. *Id.* Indeed, the D.C. Circuit, unlike the Tenth Circuit here, found the procedural due process claim "to be little more than a recasting of the substantive due process claim rejected by the Supreme Court in *DeShaney*." *Id.*

Similarly, in *Jones* v. *Union County, Tennessee*, 296 F.3d 417 (CA6 2002), the Sixth Circuit rejected a claim that a police department's failure to serve a protective order, as required by state statute, and to afford protection required by the order, infringed procedural due process rights. The Sixth

Circuit found the *Roth*-type claim "simply misplaced." *Id.* at 429; *see also Harrill* v. *Blount County, Tenn.*, 55 F.3d 1123, 1125 (CA6 1995) (rejecting claim that a police officer's failure to comply with a statutory mandate that an arrestee be allowed a phone call prior to booking gave rise to a procedural due process claim).

The Eighth Circuit has likewise rejected the type of procedural due process claim accepted by the Tenth Circuit here (albeit in a pre-*DeShaney* case). In *Doe* v. *Hennepin County*, 858 F.2d 1325 (CA8 1988), the court rejected the contention that Minnesota law created protectable property and liberty interests in the provision of social services to families against whom a complaint of child abuse had been lodged. The applicable statute provided that "[t]he local welfare agency *shall immediately* investigate and offer protective services for purposes of preventing further abuses, safeguarding and enhancing the welfare of the abused or neglected minor, and preserving family life wherever possible." *Id.* at 1327 n.2 (quoting Minn. Stat. Ann. § 626.556) (emphasis added). Despite the mandatory language of the statute, the court rejected the *Roth*-type claims by plaintiffs, whose children had been wrongfully removed from their home by child protective services for 16 days during Christmas time.

Other courts have also rejected the procedural due process claim accepted by the Tenth Circuit here. In *Semple* v. *City of Moundsville*, for example, the District Court for the Northern District of West Virginia found such a claim to be "merely a *DeShaney* claim couched in the language of procedural due process." 963 F. Supp. 1416, 1431 (N.D. W.Va. 1997). And the District of Colorado had, prior to the Tenth Circuit's contrary decision here, previously held that Colorado law did not create a protectable entitlement to protective services. *Pierce* v. *Delta County Dep't of Social Svcs.*, 119 F. Supp.2d 1139 (D. Colo. 2000).

To be sure, Judge Seymour attempted to distinguish some of these conflicting decisions. *Doe by Nelson* and *Doe by Fein* were both distinguishable, she asserted, because they involved "claims that property interests in child protective services were created *solely* by state statutes which outlined procedures," whereas the Tenth Circuit was "examining whether the restraining order and a statute mandating its enforcement creates a property interest." Pet. App. 10a n.4. Judge Kelly correctly noted in his dissenting opinion that that was a distinction without a difference. Pet. App. 45a. If Judge Seymour meant to suggest that the general statutory mandate only had application to a specific individual once a restraining order was issued, the same can be said of the general statutory mandates at issue in *Doe by Nelson* and *Doe by Fein*—they, too, only became operative upon the government's receipt of a report of abuse of a specific child. Wisc. Stat. § 48.981(3)(c) (cited in *Doe by Nelson*, 903 F.2d, at 501 n.3); D.C. CODE ANN. §§ 6-2102(b) (cited in *Doe by Fein*, 93 F.3d at 866).

Judge Seymour's attempt to distinguish *Jones* fares no better. She contended that *Jones* merely held that violation of a state statute could not give rise to a substantive due process claim and "did not provide any further discussion on whether the state statute had in fact created a protected property interest subject to procedural due process protections." Pet. App. 10a n.4. But the Sixth Circuit specifically held that "a violation of a state statute does not create a liberty interest or a property right under the Due Process Clause of the Fourteenth Amendment," and it cited *Harrill* v. *Blount County, Tenn.*, 55 F.3d 1123, 1125 (6th Cir. 1995), for the proposition that "[t]he violation of a right created and recognized only under state law is not actionable under § 1983." *Jones*, 296 F.3d at 429. In other words, the Sixth Circuit specifically rejected a Due Process claim for the violation of a state statutory mandate—the very claim accepted by the Tenth

Circuit here. *Jones*, too, is therefore directly in conflict with the Tenth Circuit's decision below.

In short, the Tenth Circuit has squarely considered the conflicting decisions of several of its sister Circuits and has, by artificial distinction, rejected their holdings. The artificial distinctions drawn by the Tenth Circuit should not insulate its decision from this Court's review of the resulting Circuit split.

III. The Tenth Circuit's Decision Also Raises Important Issues About the Kind of Process that Would Be, or Possibly Could Be, Due Before a State Actor Fails To Act.

In addition to contributing to the lopsided split between decisions of several Courts of Appeal, on the one hand, and that of the Tenth Circuit below, on the other, Judge Easterbrook's decision for the Seventh Circuit in *Doe by Nelson* also highlights another important basis for granting certiorari in this case. He could not conceive of any process that "could possibly suffice to prevent the wrongful 'deprivation' of an investigation that [was] supposed to be accomplished within 24 hours of the filing of the report." 903 F.2d at 504. Yet conceiving of appropriate procedures before a police department *fails* to enforce a protective order is just what the Tenth Circuit has now required of the district courts under its jurisdiction.

Just framing the question demonstrates the difficulty with the Tenth Circuit's position. This is not a case where the police department affirmatively sought to have Ms. Gonzales's protective order revoked, where requirements of notice and a hearing before a neutral arbiter would make some sense. Rather, the Tenth Circuit majority has now required some kind of process every time the police fail or decline to act at the behest of one who holds a protective order, apparently without regard to whether the requested action was war-

ranted, whether the necessary manpower was available, or even whether a city-wide emergency prevented an immediate response.

Just what level of process is required was largely left unanswered by the Tenth Circuit majority, which mentioned only a "right to be heard" "at a meaningful time and in a meaningful manner." Pet. App. 30a. Whatever is required at this "meaningful hearing," it is apparently more than that suggested by Judge Hartz in dissent: the right to "(1) to present evidence of a violation of the order and (2) to argue why an arrest is the proper response to the violation." Pet. App. 94a. Ms. Gonzales *was* afforded that opportunity. That the police allegedly did not act on the information she provided, or allegedly did not, in hindsight, reach the correct judgment, is not a function of the process that was afforded, but of the substantive conclusion reached (assuming it was even a *conclusion*, rather than merely inadvertent inaction), as Judge McConnell correctly pointed out in his dissent. Pet. App. 58a.

Nevertheless, the Tenth Circuit's decision now requires the lower courts in that Circuit to undertake the tall task of designing the procedures that will be required before a police officer *fails* to act, and to hold municipal governments to the predictably disastrous consequences of liability for violating whatever procedures are conceived. This Court should use its "broad" supervisory powers over the lower federal courts to terminate that fool's errand before it is begun. *See United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 40 (1950) (citing 28 U.S.C. § 2106); *Fike* v. *United Methodist Children's Home of Va., Inc.*, 547 F. Supp. 286, 287 n.1 (E.D. Va. 1982) (asserting that it had been sent on a "fool's errand" by a Fourth Circuit opinion that "provided no guidance"); *see also Carnegie-Mellon University* v. *Cohill*, 484 U.S. 343, 349 (1988) (noting that this Court created the modern doctrine of pendent jurisdiction in order to put an end to "confu-

sion" in the lower courts as they tried to apply a "murky" test).

Certiorari is therefore also warranted to prevent the disarray that most certainly will prevail as the lower courts in the Tenth Circuit (and beyond, if the Tenth Circuit's holding is accepted elsewhere) try to do the impossible and fashion procedures that must be implemented before a state or its employees *fail* to act.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

THOMAS S. RICE
ERIC M. ZIPORIN
Counsel of Record
Senter Goldfarb & Rice, L.L.C.
P.O. Box 22833
Denver, CO 80222
(303) 320-0509

JOHN C. EASTMAN
c/o Chapman University
School of Law
One University Drive
Orange, CA 92866

ERIK S. JAFFE
Erik S. Jaffe, P.C.
5101 34th Street, NW
Washington D.C. 20008

Counsel for Petitioners

Dated: August 27, 2004.

APPENDICES

APPENDIX A

TENTH CIRCUIT *EN BANC* OPINION
366 F.3d 1093 (CA10 2004)

United States Court of Appeals

FOR THE TENTH CIRCUIT

Jessica GONZALES, individually and as next best friend of her deceased minor children Rebecca Gonzales, Katheryn Gonzales and Leslie Gonzales,

Plaintiff-Appellant,

v.

CITY OF CASTLE ROCK;
Aaron Ahlfinger; R.S. Brink; Marc Ruisi,
Officers of the Castle Rock Police Department,

Defendants-Appellees.

Colorado Municipal League; Colorado Counties, Inc.; and Colorado Association of Chiefs of Police,

Amici Curiae.

No. **01-1053**

April 29, 2004

ON REHEARING EN BANC
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. NO. 00-D-1285)

Brian J. Reichel, Attorney, Thornton, Colorado, for Plaintiff-Appellant.

Thomas S. Rice, Senter Goldfarb & Rice, L.L.C. (Eric M. Ziporin, Senter, Goldfarb & Rice, L.L.C. and Christina M. Habas, Bruno, Bruno & Colin, P.C., with him on the brief), Denver, Colorado, for Defendants-Appellees.

Carolynne White, Staff Attorney, Colorado Municipal League; Thomas J. Lyons, Hall & Evans, LLC, Denver, Colorado; and Julie C. Tolleson, Kennedy & Christopher, PC, Denver, Colorado, on the brief for Amici Curiae.

Before **TACHA**, Chief Judge, **SEYMOUR**, **EBEL**, **KELLY**, **HENRY**, **BRISCOE**, **LUCERO**, **MURPHY**, **HARTZ**, **O'BRIEN**, and **McCONNELL**, Circuit Judges.

SEYMOUR, Circuit Judge.

This civil rights case asks us to decide whether a court-issued domestic restraining order, whose enforcement is mandated by a state statute, creates a property interest protected by the due process clause of the Fourteenth Amendment. The district court held it does not and dismissed the action under FED.R.CIV.P. 12(b)(6) for failure to state a claim upon which relief could be granted. A panel of this court reversed. *Gonzales* v. *City of Castle Rock*, 307 F.3d 1258 (10th Cir. 2002). On rehearing *en banc*, we reverse the district court's dismissal of Jessica Gonzales' procedural due process claim as to the City of Castle Rock, but hold that the individual police officers are entitled to qualified immunity.

I

"We review de novo the district court's dismissal under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted." *Ruiz* v. *McDonnell*, 299 F.3d 1173,

1181 (10th Cir. 2002), *cert. denied*, 538 U.S. 999, 123 S. Ct. 1908, 155 L. Ed. 2d 826 (2003). We accept as true all well-pleaded facts, liberally construe the pleadings, and make all reasonable inferences in favor of the plaintiff. *Id.* "The issue in reviewing the sufficiency of a complaint is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support her claims." Id. (citing *Scheuer* v. *Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974), *overruled on other grounds by Harlow* v. *Fitzgerald*, 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)). Only where it appears beyond a doubt that a plaintiff cannot prove any set of facts entitling her to relief, can a motion to dismiss be granted. *Id.* With these precepts guiding our review, the complaint sets forth the following tragic facts.

On May 21, 1999, Ms. Gonzales obtained a temporary restraining order limiting her husband's ability to have contact with her and their daughters, aged ten, nine and seven. The restraining order was issued by a state court in accordance with COLO. REV. STAT. § 14-10-108, and commanded in part that Mr. Gonzales "not molest or disturb the peace of [Ms. Gonzales] or . . . any child." Aplt. Appx. at 29. The restraining order further stated "the court . . . finds that physical or emotional harm would result if you are not excluded from the family home," and directed Mr. Gonzales to stay at least 100 yards away from the property at all times. *Id. See also* COLO. REV. STAT. § 14-10-108(2)(c) (party can be excluded from family home upon a showing that physical or emotional harm would otherwise result).

Neither parent nor the daughters could unilaterally change the terms of the order because it explicitly states:

> If you violate this order thinking that the other party or a child named in this order has given you permission, you are wrong, and can be arrested and prosecuted. The terms of this order cannot be changed by

agreement of the other party or the children. Only the court can change this order.

SUSAN WENDALL WHICHER & CHERYL LOETSCHER, HANDBOOK OF COLORADO FAMILY LAW, ch. IV, F-12 at 2 (3d ed. 1996) (emphasis in original) (hereinafter "Restraining Order").[1] The order also contained explicit terms directing law enforcement officials that they "shall use every reasonable means to enforce" the restraining order, they "shall arrest" or where impractical, seek an arrest warrant for those who violate the restraining order, and they "shall take the restrained person to the nearest jail or detention facility . . . ." *Id.*

Upon the trial court's issuance of the temporary restraining order, and pursuant to COLO. REV. STAT. § 18-6-803.7(2)(b), the order was entered into the state's central registry for such protective orders, which is accessible to all state and local law enforcement agencies. On June 4, 1999, the order was served on Mr. Gonzales. On that same date, upon "having heard the stipulation of the parties, and after placing the parties under oath and examining the parties as to the accuracy of the Stipulation . . . and finding that [the] Stipulation [was] in the best interests of the minor children," Aplt. Appx. at 30, the state court made the restraining order

[1] In connection with their motion to dismiss, defendants provided the district court a copy of the front side of Ms. Gonzales' temporary restraining order, as well as a subsequent court order. Aplt. Appx. at 29. However, the back of the temporary restraining order was not included. Pursuant to FED.R.EVID. 201(b), (c), we may take judicial notice of the back of the restraining order form which is accessible in SUSAN WENDALL WHICHER & CHERYL LOETSCHER, HANDBOOK OF COLORADO FAMILY LAW, ch. IV, F-12 at 2 (3d ed. 1996). *See, e.g., Pueblo of Sandia v. United States*, 50 F.3d 856, 861 n.6 (10th Cir. 1995) (court took judicial notice of government reports and documents not contained in record below). In order to make the record on appeal complete, however, we asked Ms. Gonzales to provide the court with the back side of the order, which she has done. *See* Aplt. Supp. Appx. at 3 (filed April 19, 2004).

permanent. The temporary order's terms were slightly modified to detail Mr. Gonzales' rights to parenting time with his daughters on alternative weekends, and for two weeks during the summer. The order also allowed Mr. Gonzales "upon reasonable notice . . . a mid-week dinner visit with the minor children. Said visit shall be arranged by the parties." *Id.* (emphasis added). Finally, the order allowed Mr. Gonzales to collect the girls from Ms. Gonzales' home for the purposes of parental time. However, all other portions of the temporary restraining order remained in force, including its command that Mr. Gonzales was excluded from the family home and that he could not "molest or disturb the peace" of Ms. Gonzales or the girls. *Id.* at 29.

Despite the order's terms, on Tuesday, June 22, 1999, sometime between 5:00 and 5:30 p.m., Mr. Gonzales abducted the girls while they were playing outside their home. Mr. Gonzales had not given Ms. Gonzales advanced notice of his interest in spending time with his daughters on that Tuesday night, nor had the two previously agreed upon a mid-week visit. When Ms. Gonzales realized her daughters were missing, she suspected that Mr. Gonzales, who had a history of erratic behavior and suicidal threats, had taken them. At approximately 7:30 p.m., she made her first phone call to the Castle Rock police department requesting assistance in enforcing the restraining order against her husband. Officers Brink and Ruisi were sent to her home. Upon their arrival, she showed them a copy of the restraining order, and asked that it be enforced and her children returned to her immediately. In contradiction to the order's terms, the Officers "stated that there was nothing they could do about the TRO and suggested that Plaintiff call the Police Department again if the children did not return home by 10:00 p.m." *Id.* at 9.

About an hour later, Ms. Gonzales spoke to Mr. Gonzales on his cellular telephone and he told her he was with the

girls at Elitch Gardens, an amusement park in Denver. She immediately made a second call to the Castle Rock police department, and spoke with Officer Brink, requesting that the police find and arrest Mr. Gonzales. Officer Brink refused to do so, and suggested Ms. Gonzales wait until 10:00 p.m. to see if the girls returned home. Shortly after 10:00 p.m., Ms. Gonzales called the police department and reported to the dispatcher that her daughters had yet to be returned home by their father. She was told to wait for another two hours. At midnight, she called the police department again and informed the dispatcher her daughters were still missing. She then proceeded to Mr. Gonzales' apartment complex and found no one at home. From there, she placed a fifth call to the police department and was advised by the dispatcher to wait at the apartment complex until the police arrived. No officers ever came to the complex, and at 12:50 a.m., Ms. Gonzales went to the Castle Rock police station, where she met with Officer Ahlfinger. Officer Ahlfinger took an incident report from Ms. Gonzales, but he made no further effort to enforce the restraining order against her husband or to find her children. Instead, he went to dinner.

At approximately 3:20 a.m., nearly eight hours after Ms. Gonzales first contacted the police department, Mr. Gonzales arrived at the Castle Rock police station in his truck. He got out and opened fire on the station with a semi-automatic handgun he had purchased soon after abducting his daughters. He was shot dead at the scene. The police found the bodies of the three girls, who had been murdered by their father earlier that evening, in the cab of the truck.

Ms. Gonzales subsequently brought this action on behalf of herself and her deceased daughters against the City of Castle Rock, Colorado, and Castle Rock police officers Aaron Ahlfinger, R.S. Brink, and Marc Ruisi. Pursuant to 42 U.S.C. § 1983, she claimed her due process rights were violated by the officers' failure to enforce the restraining order

against her husband. She also alleged the city maintained a custom and policy of failing to respond properly to complaints of domestic restraining order violations and tolerated the non-enforcement of such protective orders by police officers, resulting in the reckless disregard of a person's right to police protection granted by such orders.

The district court granted the defendants' motion to dismiss, finding Ms. Gonzales failed to state a claim under the Fourteenth Amendment for the deprivation of either substantive or procedural due process.[2] On appeal, the panel affirmed the district court's dismissal of Ms. Gonzales' substantive due process claim, but reversed as to the district court's procedural due process determination. The panel held the restraining order, coupled with the Colorado statute mandating the enforcement of such orders, *see* COLO. REV. STAT. § 18-6-803.5(3), established a protected property interest in the enforcement of the restraining order which could not be taken away by the government without procedural due process. *Gonzales*, 307 F.3d at 1266. The panel concluded, therefore, that Ms. Gonzales' procedural due process claim could proceed.

The city and police officers timely filed a petition for rehearing *en banc*, seeking review of the panel's conclusion that Ms. Gonzales stated a procedural due process claim. This court granted the petition, and asked the parties to address the following questions: (1) whether COLO. REV. STAT. § 18-6-803.5(3) in combination with the restraining order issued by the Colorado court created a property interest entitled to due process protection and, (2) if so, what process was due.

---

[2] Because the district court found Ms. Gonzales failed to state a claim upon which relief could be granted, the court did not address the individual officers' request for dismissal on the basis of qualified immunity, or the city's request for dismissal on the grounds Ms. Gonzales could not establish municipal liability.

II

To succeed in her § 1983 claim, Ms. Gonzales must show that she was deprived of a constitutional right by a person acting under color of state law. *Jacobs, Visconsi & Jacobs, Co.* v. *City of Lawrence*, 927 F.2d 1111, 1115 (10th Cir. 1991). At issue here is whether Ms. Gonzales' due process rights, pursuant to the Fourteenth Amendment of the U.S. Constitution, were violated when the officers failed to enforce her restraining order against her husband.

The Fourteenth Amendment specifies that no State shall "deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. The Supreme Court has noted that the contours of this constitutional provision "guarantee more than fair process and . . . cover a substantive sphere as well, barring certain government actions regardless of the fairness of the procedures used to implement them." *County of Sacramento* v. *Lewis*, 523 U.S. 833, 840, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998) (internal citation and quotations omitted). In Lewis, the Supreme Court explained that

> since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action . . . . We have emphasized time and again that the touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective.

Id. at 845-46 (internal quotations and citations omitted). Ms. Gonzales' complaint encompassed both substantive and procedural due process challenges, both of which the district court dismissed. In the substantive due process context, the argument was that Ms. Gonzales and her daughters had an inherent Constitutional right to police protection against

harm from her husband. However, as noted in our panel opinion, the Supreme Court made clear in *DeShaney* v. *Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989), that the Constitution itself does not require a state to protect its citizens from third party harm, and Ms. Gonzales' case does not fall within the narrow "danger-creation" exception arising out of *DeShaney*.[3] *See Gonzales*, 307 F.3d at 1262-63.

Contrary to the assertions of the city and officers, as well as those of our dissenting colleagues, the issue before this *en banc* court is distinct from the substantive due process claim dismissed below. Defendants and the dissenters assert that if this court concludes Ms. Gonzales has a protected property right in the enforcement of the restraining order, we will have "carved out an exception contrary to *DeShaney* and the general rule that the state does not have an affirmative duty to protect individuals from private third parties." Aple. Br. at 6. However, *DeShaney* limited its constitutional review to whether a substantive due process right to government protection exists in the abstract, and specifically did not decide whether a state might afford its citizens "an 'entitlement' to receive protective services in accordance with the terms of the statute, an entitlement which would enjoy due process protection against state deprivation" under *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). *DeShaney*, 489 U.S. 189, 195 n.2, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989). As we discuss *infra*, *Roth* clarified that "property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or un-

---

[3] The *en banc* court was not asked to address the district court's dismissal of Ms. Gonzales' substantive due process claim and the panel's affirmance thereof. Hence, that portion of the panel opinion remains undisturbed.

derstandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 577.

We are not being asked here to address whether Ms. Gonzales had a substantive right under the Constitution to receive government protection that could not be denied without a "reasonable justification in the service of a legitimate government objective." *Lewis*, 523 U.S. at 846. Rather, we must determine whether the state of Colorado created in Ms. Gonzales an entitlement that cannot be taken away from her without procedural due process, and if so, whether the officers' arbitrary denial of that entitlement was procedurally unfair. None of our dissenting colleagues who claim that we are improperly mixing substantive and procedural due process concepts suggest that the state of Colorado could not create such an entitlement if it chose to do so despite *DeShaney's* holding that there is no such entitlement protected by the substantive due process clause.[4]

---

[4] The cases Judge O'Brien cites in his dissent for the argument that our opinion ignores *DeShaney's* guiding principles, are only of limited support. *See, e.g., Collins* v. *City of Harker Heights*, 503 U.S. 115, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992); *Jones* v. *Union County*, 296 F.3d 417 (6th Cir. 2002); *Henderson* v. *Gunther*, 931 P.2d 1150 (Colo. 1997). *Collins, Jones*, and *Henderson* all specifically address questions regarding substantive rather than procedural due process. While the court in *Jones* rightly rejected the plaintiff's reliance on *Roth* for the proposition that violation of a state statute could give rise to a substantive due process claim, it did not provide any further discussion on whether the state statute at issue had in fact created a protected property interest subject to procedural due process protections. *Jones*, 296 F.3d at 429. The courts in *Doe by Fein* v. *District of Columbia*, 320 U.S. App. D.C. 198, 93 F.3d 861 (D.C. Cir. 1996), and *Doe by Nelson* v. *Milwaukee Co.*, 903 F.2d 499 (7th Cir. 1990), rejected claims that property interests in child protective services were created solely by state statutes which outlined procedures. *Doe by Fein*, 93 F.3d at 868-69; *Doe by Nelson*, 903 F.2d at 502-03. Here, we are examining whether the restraining order and a statute mandating its enforcement creates a property interest.

When the due process clause is "invoked in a novel context, it is our practice to begin the inquiry with a determination of the precise nature of the private interest that is threatened by the State. Only after that interest has been identified, can we properly evaluate the adequacy of the State's process." *Lehr* v. *Robertson*, 463 U.S. 248, 256, 77 L. Ed. 2d 614, 103 S. Ct. 2985 (1983) (citations omitted). *See also Farthing* v. *City of Shawnee*, 39 F.3d 1131, 1135 (10th Cir. 1994). We acknowledge this case raises compelling and novel questions about state created property interests and the manner by which such interests are protected by the Fourteenth Amendment. However, we are persuaded Ms. Gonzales' complaint states a claim that she possessed a protected

---

We certainly concur with the common refrain in these cases that the mere violation of state law does not automatically give rise to a constitutional due process violation, and that the due process clause should not be so stretched that it becomes "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Daniels* v. *Williams*, 474 U.S. 327, 332, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986) (quoting *Paul* v. *Davis*, 424 U.S. 693, 701, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976)). *See also Collins*, 503 U.S. at 127; *Harrill* v. *Blount County*, 55 F.3d 1123, 1125-26 (6th Cir. 1995); *Archie* v. *City of Racine*, 847 F.2d 1211, 1216-17 (7th Cir. 1988); *Henderson*, 931 P.2d at 1154-55. We are not ruling that defendants' disregard of the restraining order's terms and refusal to enforce COLO. REV. STAT. § 18-6-803.5(3) transformed what otherwise might be a state law tort claim into a federal due process action merely because defendants were state actors. Rather, the specific issue we grapple with here is whether the state of Colorado has created an entitlement for Ms. Gonzales as described in *Roth*. Only upon our determination that Ms. Gonzales has a property interest in enforcement of the court order can the claim be made that defendants' deprivation of that interest resulted in a procedural due process violation. Such a claim is entirely distinct from the substantive due process claim addressed in *DeShaney*. Of course, *DeShaney* makes clear that all individuals do not possess a substantive right to protection by the state from the harm of third parties. *DeShaney*, 489 U.S. at 197. But such a ruling does not foreclose a state from creating through its own laws an entitlement for particular citizens in having their court-issued restraining orders enforced. Our opinion is therefore not contrary to *DeShaney*.

property interest in the enforcement of the terms of her restraining order and that the officers' arbitrary denial of that entitlement violated her procedural due process rights. In reaching this conclusion, we begin by examining the restraining order issued to Ms. Gonzales and the Colorado statute mandating its enforcement.[5]

A

Our analysis must start with the familiar rubric of *Roth*. In *Roth*, the Supreme Court noted that "property" is a "broad and majestic term." *Roth*, 408 U.S. at 571. The Court "made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money," *id.* at 571-72, and "may take many forms," *id.* at 576. "Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support

[5] In this context, many of the cases Judge O'Brien cites in his dissent are inapposite to the specific facts and legal arguments raised in the present case because the courts in those cases rejected the argument that statutes detailing procedures regarding general child abuse investigations and reporting could alone create a protected interest in such services. *See, e.g., Doe by Fein*, 93 F.3d at 869; *Doe by Nelson*, 903 F.2d at 502-03; *Pierce* v. *Delta County Dep't of Soc. Servs.*, 119 F. Supp. 2d 1139, 1152-53 (D. Colo. 2000). In this case, the Colorado statute alone does not create the property interest. Rather, the court-issued restraining order, which specifically dictated that its terms must be enforced, and the state statute commanding the same, establish the basis for Ms. Gonzales' procedural due process claim.

Likewise, we disagree with Judge O'Brien's assertion that the Colorado Supreme Court made clear in *Henderson* that a case like Ms. Gonzales' could not be brought under § 1983. *Henderson* was framed entirely as a substantive due process case and did not address in any manner how and whether a state might grant to a particular person a constitutionally protected property interest in protective services. *Henderson*, 931 P.2d at 1154-56.

claims of entitlement to those benefits." *Id.* at 577. A property interest is created when a person has secured an interest in a specific benefit to which the individual has "a legitimate claim of entitlement." *Id.* The interest must be more than an "abstract need or desire" or a "unilateral expectation of" the benefit. *Id.* The Court has accordingly identified property rights protected under the procedural due process clause to include continued public employment, *Perry* v. *Sindermann*, 408 U.S. 593, 602-03, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972), a free education, *Goss* v. *Lopez*, 419 U.S. 565, 574, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975), garnished wages, *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 339, 23 L. Ed. 2d 349, 89 S. Ct. 1820 (1969), professional licenses, *Barry* v. *Barchi*, 443 U.S. 55, 64, 61 L. Ed. 2d 365, 99 S. Ct. 2642 (1979), driver's licenses, *Bell* v. *Burson*, 402 U.S. 535, 539, 29 L. Ed. 2d 90, 91 S. Ct. 1586 (1971), causes of action, *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428, 71 L. Ed. 2d 265, 102 S. Ct. 1148 (1982), and the receipt of government services, *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 11-12, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (1978) (utility services); *Mathews* v. *Eldridge*, 424 U.S. 319, 332, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976) (disability benefits); *Goldberg* v. *Kelly*, 397 U.S. 254, 262, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970) (welfare benefits).

At least two other courts have addressed whether a court order creates a *Roth*-type entitlement subject to procedural due process protections. Directly applicable here is *Coffman* v. *Wilson Police Dep't*, 739 F. Supp. 257 (E.D. Pa. 1990), in which the court found the mandatory language in a restraining order created a "property interest in police enforcement that is cognizable under *Roth*." *Id.* at 264. In *Flynn* v. *Kornwolf*, 83 F.3d 924 (7th Cir. 1996), the plaintiffs contended the specific terms of a court order created in them an entitlement to employment. After examining the order's terms, the Seventh Circuit disagreed, concluding that the order's language was not of a mandatory nature limiting the em-

ployer's discretion regarding the termination of certain positions. *Id.* at 927 (citing *Fittshur* v. *Village of Menomonee Falls*, 31 F.3d 1401, 1406 (7th Cir. 1994)). In doing so, the Seventh Circuit analyzed the court order pursuant to the analysis employed in cases determining whether a state statute creates a property interest.

> In order for an entitlement to exist, the underlying state law or order must contain particularized standards or criteria [guiding] the State's decision makers. *If the decision maker* is not required to base its decisions on objective and defined criteria, but instead *can deny the requested relief for any constitutionally permissible reason or for no reason at all, the State has not created a constitutionally protected interest.*

Olim v. *Wakinekona*, 461 U.S. 238, 249, 75 L. Ed. 2d 813, 103 S. Ct. 1741 (1983) (emphasis added) (citation and internal quotations omitted). Conversely, "the use of explicitly mandatory language, in connection with the establishment of specified substantive predicates to limit discretion, forces a conclusion that the state has created a [protected] interest." *Ky. Dep't of Corr.* v. *Thompson*, 490 U.S. 454, 463, 104 L. Ed. 2d 506, 109 S. Ct. 1904 (1989) (internal quotations omitted). *See also Bd. of Pardons* v. *Allen*, 482 U.S. 369, 379-81, 96 L. Ed. 2d 303, 107 S. Ct. 2415 (1987) (mandatory language in regulation, coupled with specific criteria which must be met in order to deny benefit, creates presumption of entitlement); *Hewitt* v. *Helms*, 459 U.S. 460, 471, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983) ("the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest"); *Greenholtz* v. *Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 11-12, 60 L. Ed. 2d 668, 99 S. Ct. 2100 (1979) (structure of regulatory provision together with word "shall" requires decision maker to take specific action unless particular criteria is met).

Hence, where a court order commands the grant of a government benefit or service through the use of mandatory language and objective predicates limiting the discretion of official decision makers, a protected property interest exists.[6] We therefore examine the restraining order to determine whether its "language is so mandatory that it creates a right to rely on that language thereby creating an entitlement that could not be withdrawn without due process." *Cosco* v. *Uphoff*, 195 F.3d 1221, 1223 (10th Cir. 1999) (per curiam).[7]

---

[6] We note *Olim*, *Thompson*, *Allen*, *Hewitt*, and *Greenholtz* addressed the extent to which liberty interests exist in the prison setting. But the methodology used in those cases has also been "employed in claims of property interests protected by the Due Process Clause of the Fourteenth Amendment." *Cosco* v. *Uphoff*, 195 F.3d 1221, 1223 (10th Cir. 1999) (per curiam). We also acknowledge the Supreme Court, in *Sandin* v. *Conner*, 515 U.S. 472, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995), abandoned the use of this methodology when examining whether a prisoner properly claims a liberty interest violation. *Id.* at 483-84 & n.5. But, the Court did not foreclose use of this analysis in non-prison settings, stating such an approach "may be entirely sensible in the ordinary task of construing a statute defining rights and remedies available to the general public." *Id.* at 481. Accordingly, in determining whether property interests exist pursuant to statute, courts have continued to examine the extent to which the statute's mandatory language and substantive criteria limit decision maker discretion. *See, e.g., Crown Point I, LLC* v. *Intermountian Rural Elec. Ass'n.*, 319 F.3d 1211, 1216-17 (10th Cir. 2003) (land development code did not create property interest in special use hearing); *Wash. Legal Clinic for the Homeless* v. *Barry*, 323 U.S. App. D.C. 219, 107 F.3d 32, 37 (D.C. Cir. 1997) (no property interest in right to homeless shelter); *Mallette* v. *Arlington County Employees' Supplemental Ret. Sys. II*, 91 F.3d 630, 637 (4th Cir. 1996) (disability retirement benefits constituted property right). Likewise, as previously noted, this analysis has also been employed to determine whether a court order created a property interest. *See Flynn* v. *Kornwolf*, 83 F.3d 924, 927 (7th Cir. 1996).

[7] Although it may ultimately be found that an individual does not satisfy the relevant criteria necessary to receive the benefit, the underlying property entitlement remains and cannot be denied without due process of law. For example, in *Memphis Light, Gas & Water Div.* v. *Craft*, 436

At the outset, we emphasize that Ms. Gonzales' entitlement to police enforcement of the restraining order against Mr. Gonzales arose when the state court judge issued the order, which defined Ms. Gonzales' rights. The restraining order was granted to Ms. Gonzales based on the court's finding that "irreparable injury would result to the moving party if no order were issued," Aplt. Appx. at 29, and that "physical or emotional harm would result if [Mr. Gonzales was] not excluded from the family home." *Id.* By its specific terms, the order made clear that Mr. Gonzales could not "molest or disturb the peace" of Ms. Gonzales or her children. *Id.* Likewise, the order gave notice to Mr. Gonzales that he could "be arrested without notice if a law enforcement officer [had] probable cause to believe that [he] knowingly violated the order." Restraining Order at 2.[8]

U.S. 1, 11-12, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (1978), the Supreme Court held that customers of a public utility had a protected property interest in continued receipt of electricity while disputing their bills. The Court reached this conclusion even though the utility had the power under state law to terminate service "for good and sufficient cause." *Id.* Likewise, in *Goldberg* v. *Kelly*, 397 U.S. 254, 262, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970), individuals challenging the termination of welfare benefits could not be denied the benefit without due process, even if the individuals were eventually deemed ineligible for relief. *See also Mallette*, 91 F.3d at 637 (party had property interest in potential eligibility for disability retirement benefits, regardless of whether party would prevail on merits). In the instant case, the restraining order's terms specifically mandate an outcome "to be reached upon a finding that the relevant criteria have been met," *Doyle* v. *Okla. Bar Assoc.*, 998 F.2d 1559, 1570 (10th Cir. 1993) (citing *Ky. Dep't of Corr.* v. *Thompson*, 490 U.S. 454, 462, 104 L. Ed. 2d 506, 109 S. Ct. 1904 (1989)) (emphasis deleted), that outcome being its enforcement.

[8] As we noted earlier, the terms of Ms. Gonzales' May 12, 1999 restraining order against her husband became permanent on June 4,1999, after the trial court held a hearing, "heard the stipulation of the parties . . . [placed] the parties under oath and [examined] the parties as to the accuracy of the Stipulation . . . and [found] that [the] Stipulation [was] in the best interests of the children." Aplt. Appx. at 30.

The restraining order's language also clearly evinced the state's intent that its terms be enforced by the police. Included within the order was a notice to law enforcement officials stating "you *shall* use every reasonable means to enforce this restraining order." *Id.* It further dictated that an officer

> *shall* arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of the restrained person when you have information amounting to probable cause that the restrained person has violated or attempted to violate any provision of this order and the restrained person has been properly served with a copy of this order or has received actual notice of the existence of this order.

Id. (emphasis added). Additionally, officers were required to enforce the order "even if there is no record of it in the restraining order central registry." *Id.* Finally, the order commanded that the officers "shall take the restrained person to the nearest jail or detention facility utilized by your agency." *Id.*

Not only does the order itself mandate that it be enforced, but the Colorado legislature passed a series of statutes to ensure its enforcement. The front of Ms. Gonzales' restraining order states that it was issued pursuant to COLO. REV. STAT. § 14-10-108. That statute details that a party may request the court to issue an order "enjoining a party from molesting or disturbing the peace of the other party or of any child [or] excluding a party from the family home . . . upon a showing that physical or emotional harm would otherwise result." COLO. REV. STAT. § 14-10-108(2)(b)-(c). In addition, COLO. REV. STAT. § 14-10-109 dictates that "the duties of police officers enforcing orders issued pursuant to . . . 14-10-108 shall be in accordance with section 18-6-803.5, C.R.S. . . . . " COLO. REV. STAT. § 14-10-109. Section 18-6-803.5 provides:

(3)(a) Whenever a restraining order is issued, the protected person shall be provided a copy of such order. A peace officer shall use every reasonable means to enforce a restraining order.

(b) A peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that:

(I) The restrained person has violated or attempted to violate any provision of the restraining order; and

(II) The restrained person has been properly served with a copy of the restraining order or the restrained person has received actual notice of the existence and substance of such order.

(c) In making the probable cause determination described in paragraph (b) of this subsection (3), a peace officer shall assume that the information received from the registry is accurate. A peace officer shall enforce a valid restraining order whether or not there is a record of the restraining order in the registry.

COLO. REV. STAT. § 18-6-803.5(3) (2002). This language is similar to that which appears in the restraining order.[9]

---

[9] While we asked the parties to brief whether a protected property interest was created by the mandatory terms and objective predicates laid out in COLO. REV. STAT. § 18-6-803.5(3), we do not so hold. Rather, we conclude that the statute's force derives from the existence of a restraining order issued by a court on behalf of a particular person and directed at specific individuals and the police.

In this context, we disagree with the dissenters' assertions that because the police are not named parties in the restraining order, they are therefore not bound to enforce its terms. *See* Kelly, J., dissent at 12; O'Brien, J., dissent at 8-9, 15-16. Surely the dissenters do not mean that police officers in Colorado are at liberty to ignore the terms of court orders, especially where such orders clearly direct police enforcement and

The district court concluded that any duty imposed upon police officers to enforce restraining orders is triggered only upon an officer's probable cause determination that the restraining order was being violated. According to the district court, because an officer's probable cause determination implicitly requires the use of judgment and discretion, no absolute duty is derived from the language mandating arrest and hence no protected property right existed. The district court is incorrect.

There can be no question that the restraining order here mandated the arrest of Mr. Gonzales under specified circumstances, or at a minimum required the use of reasonable means to enforce the order. Those circumstances were defined by the restraining order which told the police what its objective terms were and commanded that an arrest occur upon an officer's probable cause determination that the order was being violated and that Mr. Gonzales had notice of the order. The restraining order here specifically directed, with only the narrowest of exceptions, that Mr. Gonzales stay

---

are issued pursuant to legislation anticipating the same. *See* COLO. REV. STAT. § 18-6-803.5(3)(a)&(b). Other states, in clarifying the duties of police officers in these situations, have by no means sanctioned an officer's failure to enforce terms appearing in a restraining order and mandated by statute. *See, e.g., Matthews* v. *Pickett County*, 996 S.W.2d 162, 164 (Tenn. 1999) (in state tort action, officers were required to arrest offending party upon reasonable cause that party was violating restraining order where order as well as statute mandated arrest in such situations); *Campbell* v. *Campbell*, 294 N.J. Super. 18, 682 A.2d 272, 275 (N.J. Super. Ct. Law Div. 1996) (officer not immune from liability in negligence action where legislature "made it clear that a police officer must enforce a domestic violence order and all other laws which protect domestic violence victims"), *rejected in part on other grounds by Macaluso* v. *Knowles*, 341 N.J. Super. 112, 775 A.2d 108, 111 (N.J. Super. Ct. App. Div. 2001); *Nearing* v. *Weaver*, 295 Ore. 702, 670 P.2d 137, 142 (Or. 1983) (while restraining order was not addressed to police, they nonetheless had duty pursuant to statute to enforce terms of order when they had probable cause to believe order had been served and filed and named party had violated order).

away from Ms. Gonzales and her daughters. Thus, the restraining order provided objective predicates which, when present, mandated enforcement of its terms. *See Olim*, 461 U.S. at 249; *Crown Point I, LLC* v. *Intermountian Rural Elec. Ass'n*, 319 F.3d 1211, 1216-17 (10th Cir. 2003); *Dunham* v. *Wadley*, 195 F.3d 1007, 1009 (8th Cir. 2000); *Wash. Legal Clinic for the Homeless* v. *Barry*, 323 U.S. App. D.C. 219, 107 F.3d 32, 36 (D.C. Cir. 1998); *Mallette* v. *County Employee's Supplemental Ret. Sys. II*, 91 F.3d 630, 635-36 (4th Cir. 1996).

In this context, and contrary to the district court's conclusion, a police officer's finding of probable cause is not a wholly discretionary determination which undermines the mandatory edict of the restraining order or statute. While an officer must obviously exercise some judgment in determining the existence of probable cause, the validity and accuracy of that decision is reviewed under objectively ascertainable standards and judged by what a reasonably well-trained officer would know. *See Malley* v. *Briggs*, 475 U.S. 335, 345, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986). *See also Beck* v. *Ohio*, 379 U.S. 89, 96, 13 L. Ed. 2d 142, 85 S. Ct. 223 (1964) ("When the constitutional validity of an arrest is challenged, it is the function of a court to determine whether the facts available to the officers at the moment of the arrest would warrant a man of reasonable caution in the belief that an offense has been committed.") (quotation and citation omitted); *United States* v. *Davis*, 197 F.3d 1048, 1051 (10th Cir. 1999) (probable cause is measured against objective standard and evaluated against what a prudent, cautious and well trained officer would believe).

In *Allen*, the Supreme Court noted one could use the term "discretion" in two distinct ways.[10] "In one sense of the

[10] As we previously pointed out, while the Supreme Court has precluded use of the statutory analysis employed in *Allen* to determine the existence of liberty interests in a prison setting, *see Sandin*, 515 U.S. at 482-83, application of its reasoning to other settings remains valid, *id.* at 481.

word, an official has discretion when he or she 'is simply not bound by standards set by the authority in question.'" *Allen*, 482 U.S. at 375 (citing R. DWORKIN, TAKING RIGHTS SERIOUSLY 32 (1977)). In the alternative, "the term discretion may instead signify that 'an official must use judgment in applying the standards set him [or her] by authority.'" *Id.* (citing DWORKIN, *supra* at 31, 32). *See also Watson* v. *City of Kansas City*, 857 F.2d 690, 695 (10th Cir. 1988) (the determination of probable cause "represents a judgment call on the part of the officer or officers at the scene taking into account the particular circumstances. Although there are clearly guidelines, much depends upon the individual officers' assessment."). In *Allen*, the Supreme Court concluded parole guidelines created a liberty interest in parole where the guidelines mandated release upon the parole board's finding of certain factors. *Allen*, 482 U.S. at 381. While the parole board did have discretion within the Court's latter definition of the term to determine whether a prisoner satisfied the release criteria, such discretion did not extinguish the protected interest. So too in the instant case, where a court has specified the objective circumstances in which the police officer is required to act.

An officer must certainly exercise a measure of judgment and discretion in determining whether probable cause exists. However, in making that decision, the officer is bound to "facts and circumstances within the arresting officer's knowledge and of which he or she has reasonably trustworthy information [which] are sufficient to lead a prudent person to believe the arrestee has committed or is committing an offense." *Guffey* v. *Wyatt*, 18 F.3d 869, 873 (10th Cir. 1994) (internal quotation omitted). *See also Nearing* v. *Weaver*, 295 Ore. 702, 670 P.2d 137, 142 & n.7 (Or. 1983) (duty to arrest domestic order violator not discretionary despite re-

quirement that arrest be supported by probable cause); *Campbell* v. *Campbell*, 294 N.J. Super. 18, 682 A.2d 272, 274-75 (N.J. Super. Ct. Law Div. 1996) (same), *rejected in part on other grounds by Macaluso* v. *Knowles*, 341 N.J. Super. 112, 775 A.2d 108, 111 (N.J. Super. Ct. App. Div. 2001). Thus, an officer's determination of probable cause is not so discretionary as to eliminate the protected interest asserted here in having the restraining order enforced according to its terms. The officer must make a decision which, upon review, will be deemed right or wrong. Moreover, once probable cause exists, any discretion the officer may have possessed in determining whether or how to enforce the restraining order is wholly extinguished. If the officer has probable cause to believe the terms of the court order are being violated, the officer is required to arrest or to seek a warrant to arrest the offending party.

We also acknowledge there are some settings in which an officer's need to make split-second decisions in exigent circumstances might undermine a claim for protection under the Fourteenth Amendment. *Cf. Lewis*, 523 U.S. at 854-55 (substantive due process context). The officers here, however, were not faced with the necessity of making an instant judgment in a rapidly evolving situation. More importantly, they were not given carte blanche discretion to take no action whatsoever. The restraining order and its enforcement statute took away the officers' discretion to do nothing and instead mandated that they use every reasonable means, up to and including arrest, to enforce the order's terms.

Nor do we believe the language commanding that the officers use "every reasonable means to enforce this restraining order," Restraining Order at 2, undermines the order's mandatory nature. First, the order's more general command of enforcement by "every reasonable means" does not negate its more specific command that officers shall make arrests or

obtain arrest warrants when certain requirements are met.[11] Second, the order's language commanding that officers use every reasonable means to enforce the order simply indicates there may be instances where the mandatory duty of enforcing a restraining order could be accomplished through means other than arrest. Such a position is not unprecedented. Courts finding an entitlement in the enforcement of protective orders have defined the property interest in terms of a reasoned police response or reasonable protection. *See Siddle* v. *City of Cambridge*, 761 F. Supp. 503, 510 (S.D. Ohio 1991) ("when a protective order exists . . . there is a governmental duty to protect the individual, the scope of which is a reasonable protection given the resources of the governmental agency responsible"); *Coffman*, 739 F. Supp. at 266 (nature of property right in restraining order is a "reasoned police response"). Hence, while the police officers may have some discretion in how they enforce a restraining order, this by no means eviscerates the underlying entitlement to have the order enforced if there is probable cause to believe the objective predicates are met. After all, states are afforded vast discretion in how to educate their children, but the existence of such discretion did not prevent the Supreme Court from concluding that the ultimate receipt of the benefit - a

---

[11] Accepting as true the well-pleaded facts in Ms. Gonzales' complaint, and making all reasonable inferences in her favor, *Ruiz* v. *McDonnell*, 299 F.3d 1173, 1181 (10th Cir. 2002), *cert. denied* 538 U.S. 999, 123 S. Ct. 1908, 155 L. Ed. 2d 826 (2003), it is clear the police had probable cause to believe that Mr. Gonzales was violating the order. Even if the police may have initially questioned Ms. Gonzales' credibility when she told them Mr. Gonzales was violating the order, they had information arguably amounting to probable cause by at least 8:30 p.m. when Ms. Gonzales informed them her husband had taken their daughters to the amusement park. At the very minimum, the police had probable cause when Ms. Gonzales called the station for the third time at 10:00 p.m., well past a mid-week "dinner visit" with young children. They were not at liberty to second guess the objective terms of the court order, just as Mr. Gonzales was not at liberty to change its terms.

free education - was a protected entitlement. *See Goss*, 419 U.S. at 573-74.

The state's intent in creating a protected interest in the enforcement of restraining orders is highlighted by the legislative history for the statute, which emphasizes the importance of the police's mandatory enforcement of domestic restraining orders. *See* COLO. REV. STAT. § 18-6-803.5. Recognizing domestic abuse as an exceedingly important social ill, lawmakers

> wanted to put together a bill that would really attack the domestic violence problems . . . and that is that the perpetrator has to be held accountable for his actions, and that the victim needs to be made to feel safe.
>
> * * *
>
> First of all, . . . *the entire criminal justice system must act in a consistent manner, which does not now occur. The police must make probable cause arrests. The prosecutors must prosecute every case.* Judges must apply appropriate sentences, and probation officers must monitor their probationers closely. And the offender needs to be sentenced to offender-specific therapy.
>
> *So this means the entire system must send the same message and enforce the same moral values, and that is abuse is wrong and violence is criminal.* And so we hope that House Bill 1253 starts us down this road.

Aplt. Appx. at 121-122, Transcript of Colorado House Judiciary Hearings on House Bill 1253, February 15, 1994 (emphasis added). *See also* Michael Booth, *Colo. Socks Domestic Violence*, DENVER POST, June 24, 1994, at A1 (law mandates arrest when restraining order is violated or police suspect domestic violence); John Sanko, *Stopping Domestic Violence: Lawmakers Take Approach of Zero Tolerance as*

They Support Bill, Revamp Laws, ROCKY MOUNTAIN NEWS, May 15, 1994, at 5A (police must arrest and remove accused when answering domestic violence calls). The Colorado legislature clearly wanted to alter the fact that the police were not enforcing domestic abuse restraining orders.

Most significantly, the legislature included in the statute a provision which states that

> [a] peace officer arresting a person for violating a restraining order or otherwise enforcing a restraining order shall not be held criminally or civilly liable for such arrest or enforcement unless the peace officer acts in bad faith and with malice or does not act in compliance with rules adopted by the Colorado supreme court.

COLO. REV. STAT. § 18-6-803.5(5)(2002). Hence, even if an officer is mistaken in his or her determination that there is probable cause a domestic abuse restraining order is being violated, the officer will only be held liable in very limited situations. The passage of subsection (5) supports the legislature's goal that officers be vigilant and consistent in enforcing restraining orders by relieving them of any fear that an erroneous enforcement of restraining orders might result in liability. It also supports our conclusion that the state of Colorado fully intended that the recipient of a domestic abuse restraining order have an entitlement to its enforcement.[12]

---

[12] We reject Judge O'Brien's argument that Colorado's Government Immunity Act (GIA), COLO. REV. STAT. §§ 24-10-101, *et seq.*, somehow casts a shadow over Ms. Gonzales' ability to seek a constitutional remedy for the officers' failure to enforce the restraining order. By its terms, the GIA applies only to state torts and has been strictly construed against the government "in the interest of compensating victims of government negligence." *Springer* v. *City & County of Denver*, 13 P.3d 794, 798 (Colo. 2000). We have found no case in which the GIA has been invoked to preclude or limit recovery in a § 1983 procedural due process action.

See, e.g., Hulen v. *Yates*, 322 F.3d 1229 (10th Cir. 2003) (analyzing property interest created by contract with state without considering whether GIA limits remedies); *Langley* v. *Adams County*, 987 F.2d 1473 (10th Cir. 1993) (same regarding property interest in employment); *Clouser* v. *City of Thornton*, 676 F. Supp. 228 (D. Colo. 1987) (same); *Montoya* v. *City of Colorado Springs*, 770 P.2d 1358 (Colo. Ct. App. 1989) (same); *Dickey* v. *Adams County Sch. Dist. No.* 50, 773 P.2d 585 (Colo. Ct. App. 1989) (same). Rather, case law indicates the GIA has consistently been applied only to Colorado state tort law claims against government officials even when the case also includes a § 1983 claim. *See, e.g., Robinson* v. *City & County of Denver*, 39 F. Supp. 2d 1257 (D. Colo. 1999) (state tort claims against public entity barred by GIA but § 1983 claims proceeded); *Erickson* v. *Board of County Comm'rs*, 801 F. Supp. 414 (D. Colo. 1992) (§ 1983 claims analyzed separately from GIA impact on state tort claims); *Stump* v. *Gates*, 777 F. Supp. 808 (D. Colo. 1991) (same). The court in *Ruegsegger* v. *Jefferson County*, 197 F. Supp. 2d 1247, 1265-66 (D. Colo. 2001), explained why this is so:

> Constitutional claims are derived from rights created by a written constitution. In contrast, tort claims generally are based on common law principles developed through case authority. Thus, like a federal constitutional claim, a claim based on the Colorado Constitution does not lie in tort. Therefore, CGIA immunity does not attach to [a claim for violation of the state constitution].

Id.

Nor was the GIA invoked or cited by defendants in this case to undermine the validity of Ms. Gonzales' claim. Rather, defendants cite to the GIA as providing Ms. Gonzales with a civil remedy for the officer's failure to enforce the restraining order. *See* Aplt. Br. at 28 n.7 ("Under the Colorado Governmental Immunity Act, §§ 24-10-101, *et seq.*, 7B C.R.S. (2002), a party claiming injury could bring a tort claim against a law enforcement officer by alleging 'willful and wanton' conduct, essentially synonymous with the requirement of 'bad faith or malice' set forth within § 18-6-803.5(5), 6 C.R.S. (2002). *See* COLO. REV. STAT. § 24-10-118 (2002).").

The GIA tells us nothing about whether Colorado intended by the statute before us to support the constitutionally protected entitlement of enforcement possessed by recipients of a domestic abuse restraining order.

Our conclusion that the domestic abuse restraining order, whose enforcement is mandated by statute, creates a constitutionally protected entitlement, is supported by case law from other jurisdictions. As the panel opinion for this case noted:

> In *Siddle* v. *City of Cambridge*, 761 F. Supp. 503 (S.D.Ohio 1991), the court concluded that a protective order obtained pursuant to state law "creates a property right which incurs a duty on the part of the government." *Id.* at 509. The state statute there provided that "any officer of a law enforcement agency *shall* enforce a protection order issued . . . by any court in this state in accordance with the provisions of the order." OHIO REV. CODE ANN. § 3113.31(F)(3) (West 2002) (emphasis added). The court observed that holders of protective orders are entitled to greater rights than other citizens and that such an order "would have no valid purpose unless a means to enforce it exists." *Siddle*, 761 F. Supp. at 509.

Gonzales, 307 F.3d at 1264. Likewise, as we noted earlier, in *Coffman* the court concluded that the mandatory language in the restraining order itself, rather than the state statute which contained permissive language, created a "property interest in police enforcement that is cognizable under *Roth*." *Coffman*, 739 F. Supp. at 264. "An order of court, served upon the [police] Department, that states that the Department shall enforce the order is unambiguous. The word 'shall' is mandatory, not precatory, and its use in a simple declarative sentence brooks no contrary interpretation." *Id. See also Campbell*, 682 A.2d at 274 (individual officers had duty in state negligence action to enforce restraining order where statute mandated officers arrest violator of order); *Nearing*, 670 P.2d at 140-42 (same).

Thus, the specific government benefit Ms. Gonzales claims, the government service of enforcing the objective

terms of the court order protecting her and her children against her abusive husband, fits within the other types of *Roth* entitlements acknowledged by the Supreme Court and is properly deemed a property interest. Police enforcement of the restraining order, like a free education, *Goss*, 419 U.S. at 574, continued utility service, *Memphis Light*, 436 U.S. at 11-12, and welfare or disability benefits, *Goldberg*, 397 U.S. at 261-62; *Mathews*, 424 U.S. at 332, is a government benefit to which Ms. Gonzales and her daughters had a legitimate claim of entitlement. The state court's issuance of the restraining order to Ms. Gonzales, containing mandatory language and specific objective criteria curtailing the decision-making discretion of police officers, clearly commanded that the domestic abuse restraining order be enforced. The mandatory statute, its legislative history, and the grant of immunity to officers for the erroneous enforcement of restraining orders provides added weight to our conclusion. For us to hold otherwise would render domestic abuse restraining orders utterly valueless.[13]

---

[13] We disagree with Judge McConnell's assertions that our holding would allow unsuccessful substantive due process litigants to transform their claims into procedural due process challenges. Judge McConnell is correct to note that a procedural due process claim "is based on 'a denial of fundamental procedural fairness,' while a substantive claim is based on the 'exercise of power without any reasonable justification in the service of a legitimate governmental objective.'" Dissent, McConnell, J., at 3 (citing *County of Sacramento* v. *Lewis*, 523 U.S. 833, 845-46, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998)). However, contrary to Judge McConnell's contentions, Ms. Gonzales is not alleging that the officers' denial of her enforcement rights arose out of unjustified governmental action. Rather, her claim is that it was procedurally unfair for the police arbitrarily to decline to perform duties required of them pursuant to a mandatory court order which provided her a substantive property right under state law, and pursuant to a state statute commanding the same. Moreover, Ms. Gonzales is not asserting she has a right in the rare air to specific police action. *Cf. DeShaney*, 489 U.S. at 195 (due process clause, on its own, does not require "the State to protect the life, liberty, and property of its citizens against invasion by private actors"); *Doe by Fein*, 93 F.3d at 868-69 (statute outlining procedures cannot alone create protected interest); *Doe by Nelson*, 903 F.2d at 502-03 (same). Rather, pursuant to her restraining order and COLO. REV. STAT. § 18-6-803.5(3), the state of Colorado gave Ms. Gonzales a protected interest in police enforcement action. Hence, her case clearly falls within the rubric of procedural due process and should be analyzed as such. Contrary to Judge McConnell's suggestion, it would be entirely inappropriate to employ *Lewis*' "shocks the conscience" test in this case, as that test applies to substantive due process violations. *See Lewis*, 523 U.S. at 854.

Likewise, we find inapposite Judge McConnell's citation to *Reno* v. *Flores*, 507 U.S. 292, 123 L. Ed. 2d 1, 113 S. Ct. 1439 (1993), to illustrate his proposition that Ms. Gonzales is merely trying to recharacterize a substantive due process claim into a procedural due process one. In *Flores*, the Court first determined that illegal immigrant juveniles did not have a substantive due process liberty interest, pending a deportation hearing, to be released to someone other than a family member or legal guardian. *Id.* at 302-03. Because the juveniles had no liberty interest, their facial challenge to allegedly flawed INS procedures could not support their asserted procedural due process claims. *Id.* at 308-09. In contrast to the plaintiffs in *Flores*, Ms. Gonzales possesses a protected interest in the enforcement of the restraining order as granted by the state. Nor is she challenging the substance of COLO. REV. STAT. § 18-6-803.5(3), which provides guidance to officers as to the process they should employ when determining whether to enforce a restraining order. *See infra*, section B. Therefore, *Flores* is inapplicable here.

"It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Roth*, 408 U.S. at 577. There can be no doubt Ms. Gonzales and her daughters relied on the enforcement of the restraining order to go about their daily lives. Nor can there be any doubt, if the alleged facts are proven, that their reliance was arbitrarily undermined by the officers' failure to enforce the restraining order, resulting in an unspeakably tragic outcome.

B

Having established that Ms. Gonzales has a protected interest in the enforcement of the restraining order, we must now turn our focus to whether Ms. Gonzales has stated a

claim that she was denied "an appropriate level of process." *Farthing*, 39 F.3d at 1135.[14]

> The *due process clause of the Fourteenth Amendment* raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented.

Fuentes v. *Shevin*, 407 U.S. 67, 81, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972). "The 'right to be heard before being condemned to suffer grievous loss of any kind . . . is a principle basic to our society.' The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333 (quoting *Joint Anti-Fascist Comm.* v. *McGrath*, 341 U.S. 123, 168, 95 L. Ed. 817, 71 S. Ct. 624 (1951) (Frankfurter, J., concurring) and *Armstrong* v. *Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965)). A meaningful hearing protects an individual's

> use and possession of property from arbitrary encroachment [and] minimizes substantively unfair or mistaken deprivations of property . . . . So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference.

---

[14] Because the district court dismissed Ms. Gonzales' procedural due process claim based on its conclusion that she did not possess a protected property right, it did not reach the second prong of the procedural due process analysis, that is, what process is due.

Fuentes, 407 U.S. at 81. Based on the allegations in Ms. Gonzales' complaint, she did not receive any process whatsoever prior to the deprivation of her interest in enforcement of the restraining order. Instead, the officers repeatedly ignored and refused her requests for enforcement.[15]

The city and officers challenge the contention that Ms. Gonzales should have been afforded some form of process prior to their non-enforcement of the restraining order. They

---

[15] Judge McConnell contends that even if Ms. Gonzales has a protected interest in enforcement of the restraining order, her due process claim must nonetheless be classified as substantive rather than procedural. In seeking to distinguish this case from other procedural due process cases, Judge McConnell states that those cases "did not hinge, as here, on whether the results were justified, but on whether the plaintiffs had the opportunity to be heard by the appropriate officials." Dissent, McConnell, J., at 7 (citing *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 71 L. Ed. 2d 265, 102 S. Ct. 1148 (1982); *Memphis Light*, 436 U.S. at 5; *Mathews* v. *Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976); *Barry* v. *Barchi*, 443 U.S. 55, 61 L. Ed. 2d 365, 99 S. Ct. 2642 (1975); *Goss* v. *Lopez*, 419 U.S. 565, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975); *Perry* v. *Sindermann*, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972); *Bd. of Regents* v. *Roth*, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972); *Bell* v. *Burson*, 402 U.S. 535, 29 L. Ed. 2d 90, 91 S. Ct. 1586 (1971); *Goldberg*, 397 U.S. at 255; *Sniadach* v. *Family Fin. Corp.*, 395 U.S. 337, 23 L. Ed. 2d 349, 89 S. Ct. 1820 (1969)). We disagree.

Beyond question, the results in this case were devastating. However, the issue which we address here is whether the process by which the officers reached their decision not to enforce the restraining order was arbitrary and fundamentally unfair. *Cf. Lewis*, 523 U.S. at 845-46. Hence, as in the cases where the plaintiffs felt they were arbitrarily denied the right to bring a legal action, Logan, 455 U.S. at 426-27, to attend public school, *Goss*, 419 U.S. at 568-69, to enjoy tenured employment, *Perry*, 408 U.S. at 595, to possess a business or driver's license, *Barry*, 443 U.S. at 63-64; *Bell*, 402 U.S. at 536, or to receive utility services, disability benefits, or welfare benefits, *Memphis Light*, 436 U.S. at 5; *Mathews*, 424 U.S. at 322; *Goldberg*, 397 U.S. at 255, this case challenges the manner by which the police allegedly deprived Ms. Gonzales of her interest in enforcement of the restraining order.

claim Ms. Gonzales' action against them is precluded by *Parratt* v. *Taylor*, 451 U.S. 527, 537, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981), *overruled on other grounds by Daniels* v. *Williams*, 474 U.S. 327, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986), which they cite for the proposition that even if a protected property right existed, the

> necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking satisfies the requirements of procedural due process.

Aple. Br. at 27 (citing *Parratt*, 451 U.S. at 539). They specifically assert

> there is no practical pre-deprivation process under § 18-6-803.5(3) . . . which can be afforded to the holder of a restraining order. The only conceivable scenario would be to require law enforcement to provide notice of a hearing to the recipient and later entertain a hearing to determine if probable cause exists to believe that the restraining order has been violated.

Id. at 28. They also contend an adequate post-deprivation remedy exists. Consequently, they aver that Ms. Gonzales' claims cannot proceed.

We completely disagree. First,

> if the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. . . . No later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone."

Fuentes, 407 U.S. at 81-82 (citing *Stanley* v. *Illinois*, 405 U.S. 645, 647, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972)). Second, the city and officers' reliance on *Parratt* is misplaced.

Under *Parratt*, a plaintiff cannot raise a § 1983 procedural due process claim where the loss of property resulted from the random and unauthorized actions of a state actor which made the provision of pre-deprivation process impossible or impracticable, and an adequate state post-deprivation remedy exists. *Parratt*, 451 U.S. at 540-41, 543. *See also Hudson* v. *Palmer*, 468 U.S. 517, 533, 82 L. Ed. 2d 393, 104 S. Ct. 3194 (1984) ("an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post deprivation remedy for the loss is available"). Conversely, when the deprivation is caused by established state procedures, the existence of an adequate remedy at state law does not extinguish a procedural due process claim. *See Logan*, 455 U.S. at 435-37. *See also Zinermon* v. *Burch*, 494 U.S. 113, 136-39, 108 L. Ed. 2d 100, 110 S. Ct. 975 (1990).

In *Logan*, the Court held that the plaintiff suffered a procedural due process violation because established state procedures erroneously deprived him of his property interest in bringing a cause of action. *Logan*, 455 U.S. at 437. The Court distinguished the case from *Parratt*, noting that the plaintiff's deprivation was not random and unauthorized, but instead the result of an "'established state procedure' that destroyed his entitlement without according him proper procedural safeguards." *Id.* at 436.

Of primary importance here, Ms. Gonzales alleges that her deprivation was not the result of random and unauthorized behavior by the individual officers. Rather, she asserts the deprivation was the result of a custom and policy of the City of Castle Rock not to enforce domestic abuse protective

orders. In accordance with *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978),

> local governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, . . . local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels. . . . "Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute 'custom or usage' with the force of law."

Monell, 436 U.S. at 690-91 (quoting *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 167-68, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970)). *See also Murrell* v. *Sch. Dist. No. 1*, 186 F.3d 1238, 1249 (10th Cir. 1999) ("Absent . . . an official policy, a municipality may also be held liable if the discriminatory practice is so permanent and well settled as to constitute a custom or usage with the force of law.") (quotations omitted). A municipality may also be liable for the "actions of an employee who is not a final policymaking authority if a widespread practice exists to the end that there is a custom or usage with the force of law." *Sauers* v. *Salt Lake County*, 1 F.3d 1122, 1129 (10th Cir. 1993) (quotation omitted); *see also Bd. of County Comm'rs of Bryan County* v. *Brown*, 520 U.S. 397, 404, 137 L. Ed. 2d 626, 117 S. Ct. 1382 (1997).

Accepting as true the well-pleaded facts in Ms. Gonzales' complaint, and making all reasonable inferences in her favor, *Ruiz*, 299 F.3d at 1181, Ms. Gonzales has stated a claim of municipal liability against the City of Castle Rock

for the deprivation of her property interest without procedural due process. She alleges that "the City of Castle Rock, through its police department, has created an official policy or custom of failing to respond properly to complaints of restraining order violations" and "the City's police department maintains an official policy or custom that recklessly disregards a person's rights to police protection with respect to protective orders, and provides for or tolerates the non-enforcement of protective orders by its police officers . . . ." Aplt. Appx. at 12.[16] Based on these allegations, Ms. Gonzales has asserted that the deprivation of her property right was not the result of random and unauthorized acts, but instead was pursuant to an official policy or custom of the city. Just as the plaintiff in *Logan* could not be deprived of his property right by a defective state procedure that afforded him no process, neither may Ms. Gonzales' property right be denied by the city's alleged custom of refusing to enforce restraining orders. In concert with *Logan*, and based on Ms. Gonzales' complaint against the City of Castle Rock and the individual officers, her procedural due process claims are therefore not precluded by *Parratt*.

Courts dealing with the convergence of *Monell* claims and *Parratt* defenses have held accordingly. For example, in *Brooks* v. *George County*, 84 F.3d 157 (5th Cir. 1996), the court held that

> where a municipal officer operates pursuant to a local custom or procedure, the *Parratt/Hudson* doctrine is inapposite: actions in accordance with an "official policy" under *Monell* can hardly be labeled "random and unauthorized," . . . . Where employees are acting in accord with customary procedures, the "random

---

[16] Ms. Gonzales also alleges the city is liable for its failure to train officers "as to how they should respond to complaints of restraining order violations. . . ." Aplt. Appx. at 12.

> and unauthorized" element required for the application of the *Parratt/Hudson* doctrine is simply not met.

Id. at 165 (citations omitted). Likewise, in *Wilson* v. *Civil Town of Clayton*, 839 F.2d 375 (7th Cir. 1988), the court stated:

> when it is the Town itself that is being sued, and the suit is allowed under *Monell* because the action was executed in accordance with "official policy," the tortious loss of property can never be the result of a random and unauthorized act. Therefore, a complaint asserting municipal liability under *Monell* by definition states a claim to which *Parratt* is inapposite.

Wilson, 839 F.2d at 380. *See also Macene* v. *MJW, Inc.*, 951 F.2d 700, 706 (6th Cir. 1991) (when plaintiff brings municipal liability action claiming established state procedures deprived him of property interest, *Parratt* not applicable); *Matthias* v. *Bingley*, 906 F.2d 1047, 1058 (5th Cir. 1990) ("rationale of *Parratt* . . . does not apply when the challenged actions comply with City policy"); *Sullivan* v. *Town of Salem*, 805 F.2d 81, 86 (2d Cir. 1986) (if conduct of official was pursuant to town policy, *Parratt* not applicable); *Sanders* v. *Kennedy*, 794 F.2d 478, 482 (9th Cir. 1986) (*Parratt* does not apply in § 1983 action against individual officers and chief of police where plaintiff alleged property damage incurred during course of arrest was result of official policy, practice or custom); *McKee* v. *Heggy*, 703 F.2d 479, 482-83 (10th Cir. 1983) (where record suggested plaintiff's seized car was sold by police department pursuant to customary procedures treating seized vehicles as abandoned, city could be held liable for violation of procedural due process claims).

Thus, when the issue is a deprivation resulting from a municipal policy, not the random acts of rogue officers, neither the city nor individual officers can seek refuge under *Parratt*. *See Matthias*, 906 F.2d at 1058 (city not shielded by

Parratt from § 1983 liability for acts in compliance with city policy); *McKee*, 703 F.2d at 482-83 (same); *Amons* v. *Dist. of Columbia*, 231 F. Supp. 2d 109, 114 (D.D.C. 2002) (same); *Brooks*, 84 F.3d at 165-66 (individual officers sued in individual and official capacities may not rely on *Parratt* where deprivation is result of local custom or procedure); *Alexander* v. *Ieyoub*, 62 F.3d 709, 712-13 (5th Cir. 1995) (same); *Sullivan*, 805 F.2d at 86 (same). Therefore, the assertions of the city and officers that pre-deprivation process was impossible and post-deprivation proceedings adequate are inapposite here.

The district court dismissed Ms. Gonzales' complaint as deficient under FED. R. CIV. P. 12(b)(6). We thus have no record of what the police actually did or considered, or of what the City's policy actually is. In general, however, we note that "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972). In *Mathews*, the Supreme Court highlighted the "truism that 'due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews*, 424 U.S. at 334 (quoting *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895, 6 L. Ed. 2d 1230, 81 S. Ct. 1743 (1961)). "The hearing 'need not be elaborate;' indeed, 'something less than a full evidentiary hearing is sufficient.'" *Benavidez* v. *City of Albuquerque*, 101 F.3d 620, 627 (10th Cir. 1996) (quoting *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 545, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985)). For example, in *Memphis Light*, 436 U.S. at 16 & n.17, the Supreme Court held due process satisfied when prior to the termination of utility services, the customer had an opportunity to informally consult with and present her case to a designated employee of the company who had authority to correct any billing mistakes. Likewise, in *Goss* the Court held that before a student could be suspended from school, he had to

> be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.

Goss, 419 U.S. at 581 (emphasis added).

Judge McConnell implies that Ms. Gonzales did receive some form of a hearing from the officers and hence her complaint cannot be construed as challenging the lack of process she received, but, instead, is a challenge to the results of that hearing. Dissent, McConnell, J., at 6. We wholly disagree that Ms. Gonzales' repeated phone calls to the police department and the officers' seemingly outright dismissal of her claims constitutes "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333. According to Ms. Gonzales' complaint, in effect no one was listening.

In specifically determining what process is due a plaintiff, a court must balance

> three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. *See also Watson* v. *Beckel*, 242 F.3d 1237, 1240 (10th Cir. 2001); *Clark* v. *City of Draper*, 168 F.3d 1185, 1189 (10th Cir. 1999). Although the balancing test required by *Mathews* cannot be undertaken without a developed record, we note that the likelihood here of serious loss is patently evident by the very facts of this case, the murder of children the order was obtained to protect. *See Mathews*, 424 U.S. at 335. If the "discontinuance of water or heating even for short periods of time may threaten health and safety," thereby requiring pre-deprivation process, *Memphis Light*, 436 U.S. at 18, certainly one's interest in the enforcement of a domestic abuse protective order must be deemed equally vital. *See also Bell*, 402 U.S. at 539 (possession of driver's license "essential in the pursuit of a livelihood" and cannot be denied without pre-deprivation process); *Goldberg*, 397 U.S. at 263 (discontinuation of welfare benefits constitutes "grievous loss" meriting pre-deprivation process). Moreover, if it should turn out the officers repeatedly ignored and denied Ms. Gonzales' requests for enforcement, it follows that no procedures of any form were employed to minimize the risk of erroneous deprivation, *see Mathews*, 424 U.S. at 335 (court must examine "risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards"), resulting in what can only be described as the arbitrary denial of a protected interest. *See Lewis*, 523 U.S. at 845-46. Clearly then, additional procedural safeguards could have prevented the risk of erroneous deprivation of Ms. Gonzales' protected interest.

Applying the *Mathews* analysis to the allegations here, it is apparent that the restraining order enforcement statute provides direction in answering the question of what additional procedural safeguards could have been employed by the police officers. *See* COLO. REV. STAT. § 18-6-803.5. In our earlier discussion, we held the restraining order's specific terms, mandatory language, and objective predicates limiting decision maker discretion, created a protected property interest in the enforcement of the domestic abuse protective order granted to Ms. Gonzales. The statute, while absent the specificity of the restraining order, nonetheless guides officers as to the process they should provide a holder of a

restraining order before depriving that individual of his or her enforcement rights.

The statute directs police officers to determine whether a valid order exists,[17] whether probable cause exists that the restrained party is violating the order, *see* COLO. REV. STAT. § 18-6-803.5(3)(b)(I), and whether probable cause exists that the restrained party has notice of the order. *See* COLO. REV. STAT. § 18-6-803.5(3)(b)(II).[18] If, after completing these three basic steps, an officer finds the restraining order does not qualify for mandatory enforcement, the person claiming the right should be notified of the officer's decision and the reason for it.

These steps, while admittedly abbreviated, appropriately acknowledge the exigent circumstances which accompany a request to enforce a domestic abuse protection order and are sufficiently flexible to meet the demands of that particular situation. *See Morrissey*, 408 U.S. at 481. While this procedure obviously does not provide Ms. Gonzales with the opportunity for a full court hearing, it is not essential that it does so. *See Benavidez*, 101 F.3d at 627 (something less than full evidentiary hearing can be sufficient to satisfy procedural due process). Regardless of its brevity, the procedure provides the opportunity to present a request for enforcement to the police and to have it adequately and sufficiently examined prior to any official decision to deny enforcement. Of equal importance, if followed, the process would minimize

---

[17] This task can be accomplished by either examining the order in person, or by checking to see if the order has been entered in the statewide registry of protective orders. *See* COLO. REV. STAT. § 18-6-803.7 (creating central registry of protective orders issued in Colorado).

[18] In making these determinations, the statute states "a peace officer shall assume that the information received from the registry is accurate. A peace officer shall enforce a valid restraining order whether or not there is a record of the restraining order in the registry." COLO. REV. STAT. § 18-6-803.5(3)(c).

the risk of the arbitrary, erroneous or mistaken deprivation of an individual's right to have a protection order enforced. *Mathews*, 424 U.S. at 335. By completing the three steps laid out in the statute, the wrongful denial of Ms. Gonzales' right could have been prevented, and three lives potentially spared.

Nor does the identified procedure amount to a substantial burden upon the interests of police departments and municipalities. Indeed, the process would only take minutes to perform, and includes tasks officers regularly perform in the course of their daily duties. Under the balancing test required by *Mathews*, and reading the allegations of Ms. Gonzales' complaint in the light most favorable to her, we therefore determine the scales tip in her favor. Ms. Gonzales' interest in having the restraining order enforced was substantial, and without question the officers' alleged failure to provide her with any meaningful process prior to refusing to enforce the court order erroneously deprived her of her protected entitlement. Moreover, the use of additional safeguards would have certainly aided in preventing the risk of wrongful deprivation. Finally, requiring the officers to engage in this three step process prior to depriving an individual of her enforcement rights is hardly an unreasonable burden to place on the police.

In sum, we conclude that the process set up in the statute was that the police must, in timely fashion, consider the merits of any request to enforce a restraining order and, if such a consideration reveals probable cause, the restrained person should be arrested. Here, Ms. Gonzales alleges that due to the city's policy and custom of failing to properly respond to complaints of restraining order violations, she was denied the process laid out in the statute. The police did not consider her request in a timely fashion, but instead repeatedly required her to call the station over several hours. The statute promised a process by which her restraining order would be

given vitality through careful and prompt consideration of an enforcement request, and the constitution requires no less. Denial of that process drained all of the value from her property interest in the restraining order.

If one considers that constitutional process includes a right to be heard, Ms. Gonzales was deprived of that process because, according to her allegations, the police never "heard" nor seriously entertained her request to enforce and protect her interests in the restraining order. Alternatively, if one considers that the process to which she was entitled was a bona fide consideration by the police of a request to enforce a restraining order, she was denied that process as well. According to Ms. Gonzales' allegations, the police never engaged in a bona fide consideration of whether there was probable cause to enforce the restraining order. Their response, in other words, was a sham which rendered her property interest in the restraining order not only a nullity, but a cruel deception.

Based on the well-pleaded facts of Ms. Gonzales' complaint, we hold that she has adequately stated a procedural due process claim upon which relief can be granted. She had a property interest in the enforcement of the restraining order which was allegedly taken from her without due process of law. Her § 1983 action can therefore proceed.

III

We must next address whether the individual officers, acting pursuant to the official policy or custom of the City of Castle Rock, were entitled to the defense of qualified immunity. *Sullivan*, 805 F.2d at 87. Under the doctrine of qualified immunity, a government actor is not subject to liability unless it is "sufficiently clear that a reasonable official would have understood that his conduct violated the right." *Currier* v. *Doran*, 242 F.3d 905, 923 (10th Cir.), *cert. denied*, 534 U.S. 1019, 151 L. Ed. 2d 421, 122 S. Ct. 543 (2001). *See also Lybrook* v. *Members of the Farmington Mun. Sch. Bd.*

of Educ., 232 F.3d 1334, 1337 (10th Cir. 2000); *Liebson* v. *N. M. Corr. Dep't*, 73 F.3d 274, 276 (10th Cir. 1996).

"Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Currier*, 242 F.3d at 923 (citing *Medina* v. *City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992)). In the instant case, we cannot hold that a reasonable officer would have known that a restraining order, coupled with a statute mandating its enforcement, would create a constitutionally protected property interest. No Supreme Court or Tenth Circuit case has so held. Nor have we found any other circuit court cases addressing this specific question. Somewhat analogous cases from the Sixth and Eleventh Circuits have held that comprehensive state child welfare statutes created liberty interests in personal safety and the freedom from harm which gave rise to procedural due process protections. *See Meador* v. *Cabinet for Human Res.*, 902 F.2d 474, 476 (6th Cir. 1990); *Taylor* v. *Ledbetter*, 818 F.2d 791, 799 (11th Cir. 1987) (en banc). Likewise, two district courts, addressing facts similar to those in the present case, held that protective orders or their supporting statutes created a property interest in enforcement. *See Siddle*, 761 F. Supp. at 509; *Coffman*, 739 F. Supp. at 264. Nevertheless, this precedent is insufficient to clearly establish the law for this circuit. Officers Ahlfinger, Brink and Ruisi are thus entitled to the affirmative defense of qualified immunity.

The same cannot be said for the City of Castle Rock. It is well established that municipalities cannot avail themselves of the qualified immunity doctrine. *See Leatherman* v. *Tarrant Co. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166, 122 L. Ed. 2d 517, 113 S. Ct. 1160 (1993); *Dill* v. *City of Edmond*, 155 F.3d 1193, 1212 (10th Cir.

1998). Ms. Gonzales can proceed with her § 1983 action against the city.

IV

Accordingly, we **REVERSE** the district court's dismissal of Ms. Gonzales' procedural due process claim, and **REMAND** for further proceedings in accordance with this opinion.

KELLY, Circuit Judge, joined by **TACHA**, Chief Circuit Judge, and **O'BRIEN**, Circuit Judge, concurring in part and dissenting in part.

The facts of this case give new meaning to the old adage that hard cases make bad law. I understand this court's desire to fashion a cause of action to remedy what charitably could be described as gross negligence. However, I do not agree that the *Fourteenth Amendment* elevates what is essentially a case of negligence by a state actor into a constitutional violation. Accordingly, I respectfully dissent from the court's constitutionalization of state law.

I agree that the individual officers are entitled to qualified immunity, but disagree that a protected property interest exists "in the enforcement of the terms of [a] restraining order." Ct. Op. at 14. The court reaches its conclusion based upon the restraining order and the Colorado statutes upon which it is based, particularly COLO. REV. STAT. § 18-6-803.5(3) (2002). Colorado has enacted a statute making it a misdemeanor to knowingly violate a protective order, and then specified peace officers' and prosecutors' non-exclusive duties in enforcing the statute as well as the protective order itself. COLO. REV. STAT. § 18-6-803.5(1)-(3); *People* v. *Coleby*, 34 P.3d 422, 424 (Colo. 2001). A protected person may also initiate contempt proceedings against one who violates a restraining order. COLO. REV. STAT. § 18-6-803.5(7).

This court retreats from the holding of the panel opinion that the statute, by its use of objective predicates and seemingly mandatory outcomes, creates a property interest in the enforcement of a protective order by every reasonable means, including arrest whenever probable cause exists to believe the restrained person has violated the order. *Gonzales* v. *City of Castle Rock*, 307 F.3d 1258, 1265-66 (10th Cir. 2002). Instead, the court holds that the property interest derives from the protective order that is issued by a court pursuant to the statute. Ct. Op. at 21 n.9. This is largely a distinction without a difference, for the same statutory provisions the panel opinion relied upon are repeated in the protective order.[1] Moreover, the protective order binds the parties to it; it cannot bind the peace officers who are nonparties.

A. Judicial Notice

The court issues its pronouncement by taking judicial notice on appeal (and then supplementing the record with) of the back of a restraining order form. Obviously, when reversing a district court, we should hesitate to take judicial notice of (or supplement the record with), ostensibly dispositive materials not before the district court.

B. Due Process

The panel decision correctly rejected the substantive due process claims on the authority of *DeShaney* v. *Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989), which held "that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause," *id.* at 197, absent a special relationship between the State and the victim or some role of the State in creating the danger. *Gonzales*, 307 F.3d at 1262-63; *see also Duong* v. *County of*

[1] At best, they are repeated as notice provisions, they are not included in the decretal paragraphs of the order.

Arapahoe, 837 P.2d 226, 229 (Colo. Ct. App. 1992) (rejecting claim that county defendants breached a constitutional duty by failing to protect wife from husband where a permanent restraining order had been issued and the judge specifically requested security) (citing *Estate of Gilmore* v. *Buckley*, 787 F.2d 714 (1st Cir. 1986)[2]). Neither exception applies in this case, and although the facts alleged plainly state a claim for gross negligence, not every common law duty supports a federal due process violation.

The Plaintiff, however, invokes a different source of due process protection by claiming a property interest in the enforcement of her protective order, which she argues could not be deprived without an opportunity to be heard. However improbable it may be that Ms. Gonzales sought only a hearing on the decision not to enforce the protective order-rather than enforcement itself-I take her argument at face value and analyze her case under our procedural due process precedents.[3] Defendants argue that the panel's decision on the

---

[2] In rejecting a substantive due process claim on grounds anticipating *DeShaney*, the First Circuit cautioned against "an expansive guarantee of state protective services." *Estate of Gilmore*, 787 F.2d at 720.

> Enormous economic consequences could follow from the reading of the fourteenth amendment that plaintiff here urges. Firemen who have been alerted to a victim's peril but fail to take effective action; municipal ambulances which, when called, arrive late; and myriad other errors by state officials in providing protective services, could all be found to violate the Constitution. It would seem appropriate that the citizenry, acting though state legislatures and state courts, should determine how far it wishes to go in reimbursing claims of this type. We can see no justification for rewriting the due process clause of the federal Constitution so as to construct a basis for relief that can more flexibly be provided elsewhere, if that is deemed advisable.

Id. at 722-23. The same can be said about employing procedural due process to create an expansive guarantee of state protective services.

[3] I join the dissents of Judges O'Brien, McConnell and Hartz which recognize this problem.

procedural due process claim is discordant with *DeShaney* because "a private individual need not have a special relationship with the state, nor must he show the state created or enhanced the danger to establish a Fourteenth Amendment violation . . . . Instead, the individual only need cite a state law containing mandatory language and then assert that a property interest has been denied without the benefit of procedural due process." Aplees. Reh'g Br. at 6. Given that this statute primarily sets out a criminal offense and then contains procedure on how the offense is to be prosecuted, I agree.

In *Board of Regents* v. *Roth*, 408 U.S. 564, 569-71, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972), the Supreme Court held that the procedural due process requirements of the Fourteenth Amendment apply only where the particular interest at stake falls within the Amendment's protection of liberty or property. Acknowledging that the property interests protected by procedural due process "extend well beyond actual ownership of real estate, chattels, or money," the Court stated that it has "at the same time observed certain boundaries. For the words 'liberty' and 'property' in the Due Process Clause . . . must be given some meaning." *Id.* at 572. The Court went on to define a property interest as an interest "that a person has already acquired in specific benefits." *Id.* at 576 (emphasis added). Moreover, the Court added that to have a property interest in a benefit, the individual claiming the interest "must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577.

From *Roth*, it is apparent that the test for determining whether an interest in a benefit constitutes "property" for due process purposes consists of two distinct elements. First, that benefit must be specific, and second, the individual claiming the interest must have a legitimate claim of entitlement to the benefit. It has always been the law that mere procedure contained in a statute does not create a property interest-were it

otherwise every statute prescribing procedure would confer procedural due process rights. *See Olim* v. *Wakinekona*, 461 U.S. 238, 250-51, 75 L. Ed. 2d 813, 103 S. Ct. 1741 (1983).

The panel opinion determined that a portion of the statute, COLO. REV. STAT. § 18-6-803.5(3), goes beyond establishing mere procedural guidelines, and instead contains mandatory directives to enforce protective orders if certain substantive conditions are fulfilled. *Gonzales*, 307 F.3d at 1264-66. The court now focuses on those same mandatory directives as contained in the protective order. It concludes by negative inference that the failure to enforce the protective order results in a denial of a property interest for which due process protections are required. *See Sandin* v. *Conner*, 515 U.S. 472, 480-81, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995); *Hewitt* v. *Helms*, 459 U.S. 460, 472, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983); *Cosco* v. *Uphoff*, 195 F.3d 1221, 1223 (10th Cir. 1999). Even though the court has shifted its primary focus from the statute to the protective order, the statute very much matters because the form protective order contains a notice provision (on the back) that essentially repeats the statute.

Where an individual claims a property or liberty interest based upon a state statute or regulation containing mandatory language, that language must "require that a particular result is to be reached upon a finding that the substantive predicates are met." *Ky. Dep't of Corr.* v. *Thompson*, 490 U.S. 454, 464, 104 L. Ed. 2d 506, 109 S. Ct. 1904 (1989); *see also Sandin*, 515 U.S. at 481 (describing liberty interest under this approach as an enforceable expectation that mandatory language and substantive predicates "would produce a particular outcome"). Where discretion is not limited, the language is not mandatory for purposes of this analysis, and a property or liberty interest is not created. *See Olim*, 461 U.S. at 249-50 (no liberty interest in limiting prison transfers where regulations described procedure but did not place substantive limits on discretion). Stated another way, if a particular result is not required, no liberty or property interest is created. *See Thompson*, 490 U.S. at 464.

When the statute is viewed as a whole, it is apparent that it does not require a particular result in every case and necessarily involves discretion. This is a criminal statute that not only defines the crime of violation of a protective order, but also specifies how enforcement, including arrest and prosecution, may occur. A general directive in subsection 3(a) requires that "[a] peace officer shall use every reasonable means to enforce a restraining order." COLO. REV. STAT. § 18-6-803.5(3)(a). Enforcement of a protective order at this level is necessarily procedural-peace officers do not decide guilt or innocence, nor do they confer substantive benefits, including the right to be free of the activities proscribed by the statute. See id. Subsection 3(b) then elaborates on but one means of enforcement-arrest-and then contains a totally unremarkable probable cause requirement. *Id.* § 18-6-803.5(3)(b). It requires a peace officer to arrest a restrained person on probable cause that a protective order is being violated and the restrained person has notice of the order. *Id.* Even then it gives discretion to an officer to merely seek a warrant "if an arrest would be impractical under the circumstances." *Id.* The statute acknowledges means of enforcement other than arrest. *See id.* § 18-6-803.5(5) (containing an exculpatory provision for a peace officer "arresting a person for violating a protection order *or otherwise enforcing a protection order*") (emphasis added). At best, these provisions are specifications of procedure, not the creation of substantive rights inuring to the benefit of protected persons.

While the statute may channel the discretion of law enforcement, it in no way eliminates that considerable discretion for obvious reasons. As the panel noted, "an arrest is not always necessary to enforce a restraining order." *Gonzales*, 307 F.3d at 1265. It all depends upon the circumstances. In-

tervention short of an immediate arrest may be more effective, safer and more efficient for the protected person and law enforcement. Moreover, an arrest or an arrest warrant is influenced by other discretionary factors apart from probable cause, including the well-being of the protected person, the peace officer, the restrained person and the community. Whether we define the interest as "reasonable means to enforce a protection order," COLO. REV. STAT. § 18-6-803.5(3)(a), or "in terms of a reasoned police response or reasonable protection," Ct. Op. at 27, the conclusion is the same-these formulations deal with procedure and simply lack the concrete specificity necessary for a property interest.

Because of the varied circumstances that law enforcement officers confront, the Colorado legislature obviously did not prescribe arrest in all cases. Bear in mind this restraining order was issued ex parte, allowing the restrained party to move for its dissolution or modification on two days notice to the person obtaining the order. App. 29; COLO. REV. STAT. § 14-10-108(6). The restraining order was modified and made "permanent" in another temporary order not part of a final decree. App. 30. COLO. REV. STAT. § 14-10-108(5)(b)-(c). Whether we call it "a property interest in the enforcement of the terms of [a] restraining order," Ct. Op. at 14, or a property interest in "the government service of enforcing the objective terms" of a protective order, *id.* at 32, the interest identified is too general. It cannot be reduced to definite outcomes, regardless of whether the court relies upon the statute or part of an order that provides notice of the statute's terms. It matters not that the restraining order was issued on a showing of irreparable injury and that it forbade Mr. Gonzales from molesting or disturbing the peace of any party or of any child as envisioned by the statute. App. at 29; COLO. REV. STAT. 14-10-108(2)(b)-(c), (3). The cases recognizing property and liberty interests have dealt with particular and discrete outcomes where due process is required based upon state law. *See Washington* v. *Harper*, 494 U.S.

210, 221, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990) (liberty interest in freedom from arbitrary administration of antipsychotic medication); *Hewitt*, 459 U.S. at 471-72 (liberty interest in freedom from administrative segregation); *Vitek* v. *Jones*, 445 U.S. 480, 487-91, 63 L. Ed. 2d 552, 100 S. Ct. 1254 (1980) (liberty interest in freedom from an arbitrary, involuntary transfer to a mental hospital); *Greenholtz* v. *Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 11-12, 60 L. Ed. 2d 668, 99 S. Ct. 2100 (1979) (liberty interest in parole); *Wolff* v. *McDonnell*, 418 U.S. 539, 557-58, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974) (liberty interest in avoiding loss of good time credits); *Roth*, 408 U.S. at 578 (potential property interest in re-employment for the next year); *Goldberg* v. *Kelly*, 397 U.S. 254, 260-61, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970) (property interest in welfare benefits requiring pre-termination hearing). Enforcement of a protective order is different-it is necessarily case by case, influenced by a variety of decisionmakers and no single remedy would suffice. There just is not a certain outcome in which to have a legitimate expectation of entitlement. *See Doe* v. *Hennepin County*, 858 F.2d 1325, 1328 (8th Cir. 1988) ("To have an entitlement the benefit must be clearly definable; public assistance, social security or unemployment benefits are examples of such.").

As noted, although the court emphasizes the language contained in the protective order (against a backdrop of the statute), its analysis differs little from the panel opinion because both rely upon the statute's seemingly mandatory terms. *See* Ct. Op. at 21. If anything, the language in the protective order in effect complicates the analysis. First, the fact that the form of order contained a "Notice to Law Enforcement Officials" repeating the language of the statute does not eliminate the discretion of law enforcement. That section is preceded by a "Notice to Restrained Party" indicating "You *may* be arrested without notice if a law enforcement officer has probable cause to believe that you have knowingly vio-

lated this order." (emphasis added). This suggests law enforcement discretion. Second, although a later temporary order makes the restraining order permanent, the later order modified the restraining order and specifically allowed parenting time for the father. Some of that time was with notice and consent, and some was without. Regardless, the order in effect plainly contemplated that the father was to have contact with the children on alternating weekends, at mid-week dinner visits arranged by the parties, and during two weeks of the summer. App. at 30-31. The statement that: "The restraining order here specifically directed, with only the narrowest of exceptions, that Mr. Gonzales stay away from Ms. Gonzales and her daughters," Ct. Op. at 23, is somewhat beside the point, as well as inaccurate, because the restraining order had been significantly modified when the incident occurred. Determining whether the father was in compliance with the order then in effect is not quite as obvious as the court portrays it to be.

Unlike a money judgment, a protective order is not collectable, transferable, or bankable. The temporary protective order here was not an adjudication of Ms. Gonzales's rights against the law enforcement officials or an enforceable agreement between them. Instead, as its caption indicates, the protective order was issued in favor of Ms. Gonzales to protect her and her children from her husband. *See* COLO. REV. STAT. § 14-10-108(2) ("either party [spouse] may request the court to issue a temporary injunction . . . enjoining a *party* . . . excluding a *party* . . . .") (emphasis added).

The conclusion that Ms. Gonzales had a property interest in the enforcement of the terms of the protective order strongly implies that law enforcement was bound by the order also. This is untenable. For obvious reasons, the law is very specific when it comes to the legal effect of an injunction or temporary restraining order:

> **Form and Scope of Injunction or Restraining Order**. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and *is binding only upon the parties to the action*, their officers, agents, servants, employees, and attorneys, *and upon those persons in active concert or participation with them* who receive actual notice of the order by personal service or otherwise.

COLO. R. CIV. P. 65(d) (emphasis added); accord FED. R. CIV. P. 65(d). By operation of law, the defendants as nonparties were not bound by this temporary restraining order, nor could they be said to be acting in active concert or participation with either party in this case. The restraining order in this case cannot do service for a mandatory affirmative injunction that names the Defendants and the tasks they must accomplish. That Ms. Gonzales did not have an entitlement to action by law enforcement under the terms of the order is buttressed by Colorado's statutory recognition that the "violation of a protective order" is committed not by a failure of law enforcement to take specific action, but when a person subject to an order's provisions "contacts, harasses, injures, intimidates, molests, threatens, or touches any protected person or enters or remains on premises or comes within a specified distance of a protected person or premises." COLO. REV. STAT. § 18-6-803.5(1). Indeed, the back of the form also informs a restrained party that violation of such an order "will . . . constitute contempt of court," consistent with a remedy envisioned by the statute. *See* COLO. REV. STAT. 18-6-803.5(7).

Thus I fully agree with Judge O'Brien:

> Any process to which Ms. Gonzales was due based upon the decretal, and therefore enforceable, language

> of the TRO (and centuries of jurisprudence) has nothing to do with law enforcement officers. It is the right to an appropriate remedy against a contumacious party, judicially imposed after a hearing. That process was never denied Ms. Gonzales.

O'Brien, J., dissent at 9. The court rejects our observations about the limits of a restraining order as a source of constitutional tort liability as tantamount to suggesting "that police officers in Colorado are at liberty to ignore the terms of court orders, especially where such orders clearly direct police enforcement and are issued pursuant to legislation anticipating the same." Ct. Op. at 21 n.9. The court follows this with citations to cases illustrating that other states "have by no means sanctioned an officer's failure to enforce terms appearing in a restraining order and mandated by statute." *Id.* The cases all involve applications of state law (negligence or statutory negligence) and immunity defenses. Of course, police officers in Colorado are not at liberty to ignore the terms of statutes or court orders, but whether state tort law would recognize a legal duty of care for which damages may be awarded is a wholly separate question from (1) whether the officers were bound by the order and could be held to answer in contempt for any violation, and (2) whether the terms of the order create a non-discretionary entitlement. That one state court has recognized a private right of action based upon similar statutory terms, *Nearing* v. *Weaver*, 295 Ore. 702, 670 P.2d 137, 140-41 (Ore. 1983), does not persuade me that Colorado would do so, particularly given the seemingly mandatory language contained in so many Colorado enactments and the expansion of liability that such a change portends.

DeShaney foreshadowed an argument that state statutes (and perhaps orders incorporating those statutes) might create an entitlement to receive protective services. *DeShaney*, 489 U.S. at 195 n.2. *Sandin* suggests limits on recognizing a

liberty interest based upon mandatory language and substantive conditions contained in a state statute or regulation. The Court indicated that such an approach "may be entirely sensible in the ordinary task of construing a statute defining rights and remedies available to the general public," but concluded that it is "less sensible in the case of a prison regulation primarily designed to guide correctional officials in the administration of a prison." *Sandin*, 515 U.S. at 481-82. This court concludes that the approach has not been foreclosed "in non-prison settings," Ct. Op. at 18 n.6, and applies it here, but a more nuanced approach ought to be considered. After all, the Court abandoned this approach because it focused more on the statutory language rather than the nature of the alleged deprivation and "in practice [was] difficult to administer and . . . produced anomalous results." *Sandin*, 515 U.S. at 481, 483 n.5. This is apparent when one considers the apparently mandatory duties of the police chief who "shall apprehend any person in the act of committing any offense against the laws of the state or ordinances of the city and, forthwith and without any warrant, bring such person before a municipal judge, county judge, or other competent authority for examination and trial pursuant to law." COLO. REV. STAT. § 31-4-112 (2003). Although couched in mandatory terms, it does not create a property interest in enforcement of the criminal law any more than the specific criminal statute in this case or the order which incorporates the terms of the statute.

In concluding that the order creates mandatory duties, the court relies upon language (contained in the statute and the notice provisions of the order) that law enforcement "shall use every reasonable means" and "shall arrest" on probable cause. Ct. Op. at 20-21; COLO. REV. STAT. § 18-6-803.5(3)(a)-(b); *see also Gonzales*, 307 F.3d at 1265 ("shall" means "shall" and creates a mandatory obligation). Amici Colorado Municipal League, Colorado Counties, Inc., and the Colorado Association of the Chiefs of Police note that

the term "shall" is used throughout the statute to describe the procedural requirements attendant to arrest and prosecution, and that each of these acts of criminal procedure could subject local governments and individual peace officers to liability for civil damages and attorney's fees under 42 U.S.C. §§ 1983 and 1988.[4] Amici correctly focus this court's attention on the numerous procedural requirements in this statute, prompting the question of whether the procedural requirements in the peace officer provision should be construed differently than the provisions attendant to subsequent prosecution.

Notwithstanding the legislative history relied upon by this court, the language of COLO. REV. STAT. § 18-6-

[4] Amici Br. at 10-11 (*see* COLO. REV. STAT. § 18-6-803.5(3)(d) (2003) ("The arrested person *shall* be removed from the scene of the arrest and *shall* be taken to the peace officer's station for booking . . . . The prosecuting attorney *shall* present any available arrest affidavits and the criminal history of the restrained person to the court at the time of the first appearance of the restrained person before the court.") (emphasis added); *id.* § 18-6-803.5(3)(e) ("The arresting agency arresting the restrained person *shall* forward to the issuing court a copy of such agency's report, a list of witnesses to the violation, and, if applicable, a list of any charges filed or requested against the restrained person. The agency *shall* give a copy of the agency's report, witness list, and charging list to the protected party. The agency *shall* delete the address and telephone number of a witness from the list sent to the court upon request of such witness, and such address and telephone number shall not thereafter be made available to any person, except law enforcement officials and the prosecuting agency, without order of the court.") (emphasis added); *id.* § 18-6-803.5(4) ("If a restrained person is on bond in connection with a violation or attempted violation of a protection order in this or any other state and is subsequently arrested for violating or attempting to violate a protection order, the arresting agency *shall* notify the prosecuting attorney who *shall* file a motion with the court which issued the prior bond for the revocation of the bond and for the issuance of a warrant for the arrest of the restrained person if such court is satisfied that probable cause exists to believe that a violation of the protection order issued by the court has occurred.") (emphasis added)).

803.5(3) simply does not require peace officer arrests in every case any more than it requires prosecutors to prosecute every case. App. 122; *see also* COLO. REV. STAT. § 18-6-803.5(3)(d) ("The arrest and detention of a restrained person is governed by applicable constitutional and applicable state rules of criminal procedure."). By the same reasoning, the recitation of the statute in the protective order's notice provisions does not automatically require a peace officer arrest in this specific case. While the statute channels a peace officer's discretion by establishing factors that inform the probable cause determination for an arrest, peace officer discretion is not eliminated. Any other conclusion necessarily means that enforcement of this misdemeanor offense or this particular protective order prevails over any other law enforcement priorities and regardless of the circumstances. Those circumstances (not addressed by the statute or the protective order) might include the apparent seriousness of the alleged violation, the likely response of the restrained person, i.e. flight, violence or acquiescence, and the existence of any cooperating witnesses or protected persons. Such could not have been the intent of the Colorado legislature, let alone the judge that issued this protective order. *See Sealed* v. *Sealed*, 332 F.3d 51, 57-59 (2nd Cir. 2003) (finding statute that contained mandatory language authorizing removal of child ambiguous insofar as creating a substantive entitlement and certifying the interpretive issue to state supreme court). Just as in *Sandin*, the purpose of the section of the statute relied upon by this court is to guide law enforcement in the administration of a criminal offense. To be sure, the statute evinces serious concerns about protected persons, but not to the exclusion of protecting the public, other law enforcement priorities, and peace officers themselves.

Finally, the court decides what process is due here. An officer must determine whether a valid order exists, and whether there is probable cause to believe that the restrained person has notice of the order and is violating it. Ct. Op. at

46. If the officer will not enforce the order, "the person claiming the right should be notified of the officer's decision and the reason for it." *Id.* Because I would not find a property interest, it is unnecessary to comment on the utter impracticality of requiring law enforcement officers to conduct pre-deprivation hearings in the course of their other duties. *See Archie* v. *City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988) (en banc) ("It is hardly possible to hold hearings in advance to decide whether fire dispatchers will turn deaf ears to cries of distress.").

McCONNELL, J., joined by **TACHA**, C.J., and **KELLY** and **O'BRIEN**, JJ., concurring in part and dissenting in part.

Jessica Gonzales's complaint sets forth claims under the *Due Process Clause of the Fourteenth Amendment* without distinguishing between the procedural and substantive components of that provision. The district court analyzed the complaint separately under both procedural and substantive due process standards, and dismissed the complaint in both respects. The majority affirms dismissal of the substantive due process claim, but reverses as to the procedural claim. The majority devotes the bulk of its opinion to determining "whether a court-issued domestic restraining order, whose enforcement is mandated by a state statute, creates a property interest protected by the *due process clause of the Fourteenth Amendment*." Maj. Op. 2. I dissent on the ground that, even assuming the restraining order coupled with the statute creates a property interest protected by the Due Process Clause, Ms. Gonzales's complaint raises only a substantive and not a procedural claim.[1]

[1] I dissent only with respect to the majority's reversal of the district court's dismissal of Ms. Gonzales's procedural due process claim. In all other respects, I concur.

The facts, as alleged in the complaint, are that Ms. Gonzales repeatedly contacted the police regarding an apparent violation of a domestic relations restraining order, but the officers did nothing, as a result of which her children were murdered by their father. The Supreme Court has held that the Due Process Clause, of its own force, does not create a liberty or property interest in protection by the police. *DeShaney* v. *Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 196, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989). The majority correctly points out, however, that *DeShaney* is arguably distinguishable in this case, because the plaintiff does not rely on the *Due Process Clause* itself as the foundation for her claim of constitutional entitlement, but on a source in state law. Maj. Op. 11-12. The majority never convincingly explains, however, why her claim is procedural rather than substantive.

When a plaintiff asserts that a protected liberty or property interest has been infringed by action of the executive branch (such as police officers), the Supreme Court holds that the primary test for whether the action violates substantive due process is whether it "shocks the conscience." *County of Sacramento* v. *Lewis*, 523 U.S. 833, 846, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998).[2] Only when a plaintiff asserts that government action is procedurally unfair - usually for lack of a hearing - does the balancing test of *Mathews* v. *Eldridge*, 424 U.S. 319, 333-35, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976), invoked by the majority (Maj. Op. 43-44), apply. *Mathews* is a far different, and less restrictive,

[2] There is no need to reflect here on whether the egregious dereliction of the Castle Rock police department (assuming the allegations of the complaint to be true) meets this high standard, because Ms. Gonzales's substantive due process claim was dismissed, that dismissal was affirmed by the panel, and en banc review of that portion of the panel's decision was not sought. *See* Maj. Op. 11 n.3.

test for a plaintiff to satisfy than the "shocks the conscience" test.

The question is whether the facts, as alleged, constitute a procedural due process claim. I think they do not. The "touchstone of due process"—both substantive and procedural—"is protection of the individual against arbitrary action of government." *Wolff* v. *McDonnell*, 418 U.S. 539, 558, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974), quoted in *Lewis*, 523 U.S. at 845. But a procedural due process claim is based on "a denial of fundamental procedural fairness," while a substantive claim is based on the "exercise of power without any reasonable justification in the service of a legitimate governmental objective." *Id.* at 845-46.

Although the majority employs the language of procedural due process, Ms. Gonzales's complaint contains no reference to procedural issues in any form. She does not complain that she was denied a "right to be heard," *Mathews*, 424 U.S. at 333, or that the police conduct was "procedurally unfair," Maj. Op. 33 n.13. She makes no allegations regarding "the manner by which the police allegedly deprived [her] of her interest in enforcement of the restraining order." Maj. Op. 36 n.15 (emphasis in original). She does not allege that if she had been given the opportunity of presenting her views to the decisionmakers, it would have affected the outcome. The language of procedural unfairness comes from the majority opinion, not from the complaint. Ms. Gonzales's complaint is that the police officers arbitrarily and for no legitimate reason failed to enforce the protective order. *See* Complaint, PP 21, 28 (The Defendants' "actions were taken either willfully, recklessly or with such gross negligence as to indicate wanton disregard and deliberate indifference to the civil rights of Plaintiff and the three children."). That is a quintessentially substantive claim; it goes to the lack of justification for the police officers' failure to act and not to the process by which they reached their decision.

As a matter of constitutional categorization, Ms. Gonzales's claim is not distinguishable from that in *Lewis*. There, the plaintiffs sued police officers for depriving their son of his life (undoubtedly a protected interest under the *Due Process Clause*) as a result of a high-speed police chase alleged to be deliberately indifferent to, or in reckless disregard for, his safety. *See* 523 U.S. at 854 (plaintiffs alleged that the police action manifested "recklessness, gross negligence and conscious disregard for [plaintiff's] safety"; "deliberate indifference"). Here, using the same vocabulary of recklessness, gross negligence, and deliberate indifference (Complaint, PP 21, 28), Ms. Gonzales sues for an allegedly arbitrary and unjustified failure to enforce a protective order. The only difference is that *Lewis* involved action, while this case involves a failure to act. In both cases, however, the crux of the matter is that allegedly arbitrary and unjustifiable police conduct resulted in a deprivation. Nor could the problem be solved by the addition of procedural language to Ms. Gonzales's complaint. The plaintiffs in *Lewis* could not have prevailed simply by recharacterizing their complaint as one of procedural due process, by saying, for example, that the police should have engaged in some form of pre-deprivation procedure to decide whether they should engage in the high-speed chase.[3] The distinction between procedural and substantive due process is not one of pleading, but of the nature of the claim.

The majority's argument to the contrary is long on assertion and short on explanation. *See* Maj. Op. 33 n.13, 36 n.15. The majority claims:

---

[3] Although the Court left open the possibility of a procedural due process claim in cases like *Lewis*, it suggested that the only available procedural claim in such cases is a post-deprivation compensation scheme. 523 U.S. at 840 n.4. The majority's view, by contrast, is that Ms. Gonzales was entitled to some kind of pre-deprivation procedure.

> However, contrary to Judge McConnell's contentions, Ms. Gonzales is not alleging that the officers' denial of her enforcement rights arose out of unjustified governmental action. Rather, her claim is that it was procedurally unfair for the police arbitrarily to decline to perform duties required of them pursuant to a mandatory court order which provided her a substantive property right under state law, and pursuant to a state statute commanding the same.

Maj. Op. 33 n.13. But quite the opposite is true. The problem, as alleged by Ms. Gonzales, is that the police officers f*or no sufficient reason* ("recklessly" or with "gross negligence") failed to enforce the restraining order. Her claim is precisely that the officers' conduct was *unjustified. Cf. Lewis*, 523 U.S. at 845 (a claim that government action is "without any reasonable justification" is a substantive due process claim). If, on remand, it turns out that the police officers did not behave "arbitrarily" but had a good reason for their actions (for example, every available officer was away tending to a dreadful emergency), Ms. Gonzales would lose on the merits. By contrast, in all the procedural due process cases on which the majority relies, the focus of the litigation was on the process by which the state actor reached the decision - not on whether the ultimate result was justified. *See Carey* v. *Piphus*, 435 U.S. 247, 266, 55 L. Ed. 2d 252, 98 S. Ct. 1042 (1978) ("the right to procedural due process . . . does not depend upon the merits of a claimant's substantive assertions"). In a procedural due process case, a claimant who is denied a hearing to which he is entitled will prevail, even if the state action was substantively justified. *Id.* In the present case, by contrast, unless Ms. Gonzales can substantiate her allegations that the police officers acted "arbitrarily" - that is, without adequate justification under the law - she will lose.

The substantive character of Ms. Gonzales's claim is further evident in the fact that she does not propose any procedures that should be instituted when persons protected by restraining orders request police action. She cannot say she was not given a chance to be heard. She called several times and explained the situation to the police, and she met with the police in person both at her home and at the police station. The problem is not that she was denied a hearing, but that the officers failed to do their duty. The problem was with the result.[4] This is in marked contrast to the Supreme Court's procedural due process cases, on which the majority relies (Maj. Op. 15-16): *Board of Regents* v. *Roth*, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972); *Perry* v. *Sindermann*, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972); *Goss* v. *Lopez*, 419 U.S. 565, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 23 L. Ed. 2d 349, 89 S. Ct. 1820 (1969); *Barry* v. *Barchi*, 443 U.S. 55, 61 L. Ed. 2d 365, 99 S. Ct. 2642 (1979); *Bell* v. *Burson*, 402 U.S. 535, 29 L. Ed. 2d 90, 91 S. Ct. 1586 (1971); *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 71 L. Ed. 2d 265, 102 S. Ct. 1148 (1982); *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (1978); *Goldberg* v. *Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970); and *Mathews* v. *Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976). In each of these cases, the consequence of finding a procedural due process violation would be to require the government to provide some type of hearing, either in advance of the deprivation or within a reasonable time thereafter. *See* Henry J. Friendly, "Some Kind of Hearing", 123 U. Pa. L. Rev. 1267 (1975). The litigation did not hinge, as here, on whether the

---

[4] My point is not—as the majority suggests (Maj. Op. 44)—that Ms. Gonzales's claim fails because she received the hearing to which she was supposedly entitled. It is that the presence, or lack, of a hearing is not the real issue.

results were justified, but on whether the plaintiffs had the opportunity to be heard by the appropriate officials.

The majority is remarkably vague about what kind of "hearing" Ms. Gonzales should have received. *See* Maj. Op. 42-43 ("we note that 'due process is flexible and calls for such procedural protections as the particular situation demands'") (quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 481, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972)). The majority suggests that "the restraining order enforcement statute provides direction in answering the question of what additional procedural safeguards could have been employed by the police officers." Maj. Op. 45. According to the majority, these "safeguards" consist of (1) determining whether a valid order exists, (2) determining whether probable cause exists that the restrained party has notice of the order and is violating it, and (3) notification of the officer's decision and the reason for it. *Id.* at 46. The first two are plainly irrelevant: neither the existence of the order nor the existence of probable cause has ever been disputed. That leaves the third: informing Ms. Gonzales of the officers' "decision." It seems to me that, if the police had told Ms. Gonzales they were not going to take action, Ms. Gonzales would have precisely the same constitutional claim she does now - only somewhat easier to prove. Surely the majority does not mean to suggest that the "procedural safeguard" Ms. Gonzales was entitled to was being informed that she would get no help.[5]

These suggestions thus confirm the non-procedural character of Ms. Gonzales's claim. Unlike the plaintiffs in *Perry*, *Goss*, *Sniadach*, *Barry*, *Bell*, *Logan*, *Memphis Light*, *Goldberg*, and *Mathews*, Ms. Gonzales's deprivation was not the

[5] If that were an adequate procedural safeguard, *Memphis Light* satisfied its procedural due process obligation when it informed the Crafts their utilities would be cut off, *Memphis Light*, 436 U.S. at 13-14, and Mr. Kelly got what was "due" when he was told his welfare was terminated, *Goldberg*, 397 U.S. at 267-68.

result of an erroneous determination on a question of fact. It was, as alleged, "arbitrary" in the sense of having no justification at all. It was an act of "deliberate indifference," like that in *Lewis*, 523 U.S. at 850-51, a substantive due process case.

At oral argument, Ms. Gonzales's counsel suggested that the procedures to which she was entitled were those set forth in the applicable Colorado statute: to use every reasonable means to enforce the order, including arresting the offender or, if actual arrest is not feasible, seeking an arrest warrant. But these procedures constitute Ms. Gonzales's substantive entitlement; they are what she claims she was deprived of without due process. These are not procedures to determine whether she was entitled to enforcement of the order, which is what procedural due process is about.

If the majority is correct, it will always be possible for plaintiffs to recharacterize their substantive due process claims against arbitrary action by executive officials as "procedural due process" claims, thus avoiding the Supreme Court's exacting "shocks the conscience" test and getting, instead, the balancing test of *Mathews*. It will always be possible to say that, before they took the complained-of action, the executive officials should have engaged in some additional deliberative process, which might have averted the problem. For example, in *Abeyta by and through Martinez* v. *Chama Valley Indep. Sch. Dist. No. 19*, 77 F.3d 1253, 1257-58 (10th Cir. 1996), we held that a school teacher who repeatedly called a 12-year-old student a "prostitute" did not violate her substantive due process rights because his conduct, while reprehensible, was not sufficiently egregious to "shock the conscience." Under the majority's reasoning, the plaintiff should have styled the claim as a procedural deprivation (of her liberty interest in personal security and emotional well-being) and alleged that the real harm was that the teacher determined that she was a prostitute without first

holding a hearing on the question. Similarly, in *Uhlrig* v. *Harder*, 64 F.3d 567 (10th Cir. 1995), this Court rejected a substantive due process claim by a therapist at a mental hospital who was killed by an inmate as the result of a decision by hospital administrators to close a special unit for the criminally insane, because the decision "was not the result of reckless and 'conscience shocking' conduct." *Id.* at 576. Again, however, today's opinion would allow the plaintiff to get around *Lewis* by alleging a procedural defect, for example, that the hospital administrators ought to have engaged in a more thorough consideration of the dangers of closing the special unit.

In *Reno* v. *Flores*, 507 U.S. 292, 123 L. Ed. 2d 1, 113 S. Ct. 1439 (1993), the Supreme Court gave short shrift to a plaintiff's attempt to reformulate an essentially substantive due process claim in procedural terms. In that case, the Supreme Court rejected the plaintiff's substantive due process claim that a child had a fundamental right to be free from custody when freedom from custody might be in the child's best interest. *Id.* at 305-06. The plaintiff also characterized the argument as a procedural due process claim by arguing that the government's procedures failed to make a case-by-case determination of the best interest of the child when it decided whether to keep a child in custody. The Supreme Court rejected the attempt to disguise a substantive claim as a procedural one: "Respondents contend that this procedural system is unconstitutional because it does not require the [INS] to determine in the case of each individual alien juvenile that detention in INS custody would better serve his interests than release to some other 'responsible adult.' This is just the 'substantive due process' argument recast in 'procedural due process' terms, and we reject it for the same reasons." *Id.* at 308.

The effect of allowing claims that are essentially substantive to masquerade as procedural is to collapse the distinction

between the two components of due process and to expand greatly the liability of state and local governments. Sympathetic though we are, and should be, to persons in Ms. Gonzales's unhappy situation, we are not authorized under the Fourteenth Amendment to do what she asks.

O'BRIEN, Circuit Judge, dissenting, with whom **TACHA**, Chief Circuit Judge, and **KELLY**, Circuit Judge, join:

The majority opinion ignores guiding principles announced in *DeShaney*,[1] leaving us both adventurous and alone,[2] dramatically separated from other circuits.[3] This de-

---

[1] *DeShaney* v. *Winnebago*, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989).

[2] In nearly fifteen years since *DeShaney* no other circuit has ventured this far. However, in a similar case the Second Circuit, citing the panel decision, certified a question about the reach of a child welfare statute to the Connecticut Supreme Court. *Sealed* v. *Sealed*, 332 F.3d 51 (2d Cir. 2003).

[3] All circuits reaching the merits have gone the other way. *Jones* v. *Union County, Tenn.*, 296 F.3d 417, 429 (6th Cir. 2002) (holding, among other things, that a state actor's violation of a Tennessee statute providing, "the court shall cause a copy of the [family violence] petition . . . to be served upon the respondent at least five (5) days prior to such hearing" did not qualify as a state created liberty or property interest under *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972) (emphasis added)); *cf.*, *Matthews* v. *Pickett County, Tenn.*, 996 S.W.2d 162 (Tenn. 1999) (allowing a state tort action against police officers who negligently failed to arrest a restrained person when requested by the victim); *Doe by Fein* v. *District of Columbia*, 320 U.S. App. D.C. 198, 93 F.3d 861 (D.C. Cir. 1996) (rejecting a procedural due process claim for failing to effectuate child abuse protective services, finding there is no entitlement to such protective services under mandatory child abuse statute); *Harrill* v. *Blount County, Tenn.*, 55 F.3d 1123, 1125 (6th Cir. 1995) (a Tennessee statute requiring an arrestee to be given an opportunity to make a phone call before "booking" did not create a protected property or liberty interest); *Doe* v. *Milwaukee County*, 903 F.2d 499 (7th Cir. 1990) (rejecting a procedural due process claim for failing to investigate child abuse, finding no "entitlement" in such

cision rests on tenuous grounds and invites litigation in even more dubious cases. For those reasons, I dissent and join the dissents of Judge Kelly and Judge McConnell.

Superficially bowing to Supreme Court precedent, the majority acknowledges the futility of the substantive due process arguments. But the veneer of procedural due process applied in its stead hardly obscures the obvious-the method is an artifact of substantive due process; perverse, because, surreptitiously, it achieves the very result *DeShaney* decried. No matter how fervently we desire mankind to be honest, life to be fair, and the laws to be obeyed, our hopes are not entitlements for which individuals may exact a monetary remedy from state entities and actors when reality does not meet expectations.

And in reality's penetrating light there can be no doubt; Ms. Gonzales is not seeking a remedy for a pretermitted hearing. Irrespective of Colorado tort law, she wants the equivalent of a tort remedy against the City of Castle Rock for the deaths of her three daughters, deaths delivered at their father's hand. Her claimed entitlement (enforcement of a restraining order) is not a property interest and, accordingly, does not warrant due process protection.

---

procedures--no entitlement triggering due process protection in statutorily required child abuse investigation). *See also Archie* v. *Racine*, 847 F.2d 1211 (7th Cir. 1988) (no property interest in required fire protection--prior to *DeShaney*), *cert. denied*, 489 U.S. 1065, 103 L. Ed. 2d 809, 109 S. Ct. 1338 (1989); *Pierce* v. *Delta County Dep't of Social Svcs.*, 119 F. Supp. 2d 1139 (D. Colo. 2000) (rejecting a procedural due process claim for failing to comply with statutory child protection reporting and investigatory procedures, finding there is no entitlement to protective services under these procedures); *Semple* v. *City of Moundsville*, 963 F. Supp. 1416 (N.D. W. Va. 1997) (rejecting a procedural due process claim for failing to advise domestic abuse victims of their rights and failing to serve domestic violence temporary protective order as required by statute, finding no entitlement to such procedures), *cert. denied*, 528 U.S. 1189, 146 L. Ed. 2d 102, 120 S. Ct. 1243 (2000).

Principle –

In *DeShaney* social workers removed a child from his father's care, suspecting abuse, but later returned the child to him. After the child was returned, the father repeated his abuse, rendering the child permanently brain damaged. The issue was whether state actors were liable for damages on substantive due process grounds. That decision should provide the analytical touchstone for this case:

> Nothing in the language of the *Due Process Clause* itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means . . . . Its purpose was to protect the people from the State, not to ensure that the State protected them from each other.

489 U.S. at 195-96. The Court emphasized the need for rational analysis in emotionally laden cases:

> Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation for the grievous harm inflicted upon them. But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State of Wisconsin, but by Joshua's father. The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them. In

> defense of them it must also be said that had they moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent-child relationship, charges based on the same *Due Process Clause* that forms the basis for the present charge of failure to provide adequate protection.

Id. at 202-03.

With unmistakable clarity, the Court said "the State had no constitutional duty to protect Joshua against his father's violence, its failure to do so-though calamitous in hindsight-simply does not constitute a violation of the Due Process Clause." *Id.* at 202. Seemingly, but apparently not, *DeShaney* put to rest the notion that simply because a state takes steps to protect citizens from harm it thereby insures them against all ravages of modern life.

The majority of this Court observes that *DeShaney* resolved a "substantive due process" issue and did not reach the companion "procedural due process" arguments. *Id.* at n.2. That observation, while correct, provides cold comfort. The Supreme Court acknowledged the right of a state to expand its tort law to include "special relationship" tort liability, but the decision can hardly be considered to contain an invitation to expand the entitlement rationale of procedural due process. *Id.* at 203. Particularly so in light of the caveat, frequently repeated, that the Due Process Clause does not "transform every tort committed by a state actor into a constitutional violation." *Id.* at 202. The majority ignores that admonition and its companion; states should not have liability "thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment."[4] *Id.* at 203. I

[4] Apparently it bears repeating. Shortly after *DeShaney*, in *Collins* v. *City of Harker Heights, Tex.*, 503 U.S. 115, 128, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992), the Supreme Court reiterated the principle, but in a slightly different context, saying:

> Petitioner's claim is analogous to a fairly typical state-law tort claim: The city breached its duty of care to her husband by failing to provide a safe work environment. Because the Due Process Clause "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society," *Daniels* v. *Williams*, 474 U.S., at 332, 106 S. Ct. , at 665, we have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law, *see, e.g., id.*, at 332-333, 106 S. Ct. , at 665-666; *Baker* v. *McCollan*, 443 U.S. 137, 146, 99 S. Ct. 2689, 2695, 61 L. Ed. 2d 433 (1979); *Paul* v. *Davis*, 424 U.S. 693, 701, 96 S. Ct. 1155, 1160, 47 L. Ed. 2d 405 (1976). The reasoning in those cases applies with special force to claims asserted against public employers because state law, rather than the Federal Constitution, generally governs the substance of the employment relationship. *See, e.g., Bishop* v. *Wood*, 426 U.S. 341, 350, 96 S. Ct. 2074, 2080, 48 L. Ed. 2d 684 (1976); *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 577-578, 92 S. Ct. 2701, 2709-2710, 33 L. Ed. 2d 548 (1972).

see no reason to ignore the principles clearly and forcefully stated in *DeShaney* and *Collins*.

For me, this case reduces to utter simplicity. Should directive language from a Colorado statute be expansively construed for the sole purpose of subjecting state entities and actors to thinly disguised federal tort liability? I think not. We should defer to the State of Colorado, allowing it to determine the reach of its laws consistent with its constitution, statutes, cases and traditions. If *DeShaney* and *Collins* did not pave the way, they certainly lit the path. In any event, principle aside, "entitlement" analysis cannot justify the majority's result.

Property –

The majority is "persuaded Ms. Gonzales' complaint states a claim that she possessed a protected property interest

in the enforcement of the terms of her restraining order and that the officers' arbitrary denial of that entitlement violated her procedural due process rights." Majority Op., p. 14. It says that is so because "where a court order commands the grant of a government benefit or service through the use of mandatory language and objective predicates limiting the discretion of official decision makers, a protected property interest exists." *Id.*, pp. 17-18.[5] It emphasizes "that Ms. Gon-

[5] The majority tells us, "our conclusion that the domestic abuse restraining order, whose enforcement is mandated by statute, creates a constitutionally protected entitlement, is supported by case law from other jurisdictions." Majority Op., p. 30. Indeed, two district court opinions did so hold. *Siddle* v. *City of Cambridge, Ohio*, 761 F. Supp. 503 (S.D. Ohio 1991); *Coffman* v. *Wilson Police Dep't*, 739 F. Supp. 257 (E.D. Pa. 1990). But *Flynn* v. *Kornwolf*, 83 F.3d 924 (7th Cir. 1996), is quite another matter. In that case, plaintiffs claimed the court order appointing them to the position of court attendants bestowed a property right in spite of contrary Wisconsin law. The district court and the Seventh Circuit concluded otherwise. The court's use of the "explicitly mandatory language" in evaluating an administrative order dealing with court personnel is hardly analogous to this situation, but the result is enlightening because the court refused to use the court order to extend liability. It said:

> Next, the plaintiffs contend that the March 1993 court order appointing them court attendants gave them a property interest in their employment. The order lists the plaintiffs' names, defines their authority, and states that the order expires on December 31, 1993. The plaintiffs argue that the order appointed them for a definite term, and therefore they had a "legally enforceable expectancy" in their employment and could be terminated only for cause.
>
> The Wisconsin Supreme Court has held that "absent civil service regulations or laws, or a contract or collective bargaining agreement, a [public] employee is an employee at will and has no property interest in employment." *Vorwald* v. *School Dist. of River Falls*, 167 Wis. 2d 549, 557, 482 N.W.2d 93, 96, *cert. denied*, 506 U.S. 941, 113 S. Ct. 378, 121 L. Ed. 2d 289 (1992).
>
> The plaintiffs contend that, like civil service regulations or laws, or contracts or collective bargaining agreements, the court order appointing them abrogated Wisconsin's general rule of at-will employment and made their employment terminable only for cause. They assert that the order gave them a "legitimate claim of entitlement" to their employment during its effective dates, and that they therefore had a property interest in their jobs.
>
> The plaintiffs' argument fails. Although the court order appointing them to their positions did contain an expiration date, it "placed no substantive restriction on the county's [or the appointing judges'] authority to terminate" the plaintiffs before it expired. *See Warzon*, 60 F.3d 1234, 1240. Nowhere does the order state in "explicitly mandatory language" that the appointing judges have limited discretion to terminate the plaintiffs' employment at the judges' will. *See Fittshur*, 31 F.3d at 1406. Absent such language, the mere fact that the plaintiffs allegedly relied on the order as guaranteeing their employment until the order expired was not sufficient to create a property interest that would trigger due process protections.
>
> Because neither Racine County Ordinance § 17-1 *et seq.* nor the court order gave the plaintiffs a property interest in their employment, the defendants were free to terminate them "whenever and for whatever reasons [they] so desire [d]." *Wilcox* v. *Niagara of Wisconsin Paper Corp.*, 965 F.2d 355, 358 (7th Cir. 1992). The district court properly dismissed the plaintiffs' complaint for failure to state a claim.

Id. at 926-27.

zales' entitlement to police enforcement of the restraining order against Mr. Gonzales arose when the state court judge issued the order, which defined Ms. Gonzales' rights." *Id.*, p. 14. If the court order is of such significance, that significance must be measured by its terms, recognizing that in an adversarial system courts do not create rights but adjudicate and declare the rights of the litigants under existing law.

The "TEMPORARY RESTRAINING ORDER PURSUANT TO SECTION 14-10-108, C.R.S." (TRO) is directed only to the Respondent, Simon James Gonzales. Nothing in the decretal portion of the TRO (or any other portion of the TRO itself) is directed to any individual or entity of the law enforcement community. A copy of the TRO is

attached. Below the date and judge's signature appears a caveat: "PLEASE NOTE: IMPORTANT NOTICES FOR RESTRAINED PARTIES AND LAW ENFORCEMENT OFFICIALS ON REVERSE." The "Notice To Law Enforcement Officials" contained on the reverse paraphrases the Colorado Statutes. The permanent order, entered in the divorce (a separate case) and stipulated to by the parties, extended and slightly modified the family violence TRO. It allowed Mr. Gonzales parenting time, but contained no more explicit terms about enforcement. No law enforcement entities or individuals were parties to the family violence case or the companion divorce case. The order did, indeed, "define Ms. Gonzales' rights," but whatever substantive rights were declared or established by the court could only be in relation to her husband, the only other party to the litigation. Those are the substantive rights due process must serve. The attendant process for enforcement of such rights is well known to courts and litigants alike--resort to the court for orders in aid of execution or to exercise its contempt powers; remedies that have their own procedural due process requirements. Any process to which Ms. Gonzales was due based upon the decretal, and therefore enforceable, language of the TRO (and centuries of jurisprudence) has nothing to do with law enforcement officers. It is the right to an appropriate remedy against a contumacious party, judicially imposed after a hearing. That process was never denied Ms. Gonzales.

If Ms. Gonzales has additional rights, which amount to property entitled to due process protection, they must derive from a legitimate source, such as the common law or, as she claims, the Colorado statutes. Ms. Gonzales must demonstrate that her claimed statutory rights are specific, certain and enforceable.[6] "The requirements of procedural due proc-

[6] *Doyle* v. *Oklahoma Bar Ass'n*, 998 F.2d 1559, 1569 (10th Cir. 1993). *See* discussion *infra*, n.7.

ess apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite." *Roth*, 408 U.S. at 569-70 (footnote omitted).

Even if "property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money" and may take many forms, the most generous definition is constitutionally confined. *Id.* at 571-72 (footnote omitted). "While the Court has eschewed rigid or formalistic limitations on the protection of procedural due process, it has at the same time observed certain boundaries. For the words 'liberty' and 'property' in the Due Process Clause of the Fourteenth Amendment must be given some meaning." *Id.* at 572. Thus the Court expressly acknowledged the constitutional mooring of, and limits upon, procedural due process jurisprudence.[7] In doing so, it emphasized that procedural due process applies to property interests "that a person has already acquired in specific benefits." *Id.* at 576. To obtain a property interest in a "benefit," a person clearly must have more than an abstract need, desire or unilateral expectation of it. *Id.* at 577. Rather, they must have a legitimate claim of entitlement to it. *Id.*

As important as *Roth's* recognition that the procedural protection language of the Constitution is limiting as well as

[7] *Roth's* holding that the Fourteenth Amendment's procedural protection applies only to life, liberty and property interests may have been a retreat from a prior and more expansive reading, which extended procedural protection to "important interests," *Bell* v. *Burson*, 402 U.S. 535 at 539, 29 L. Ed. 2d 90 (1971) and "grievous loss," *Goldberg* v. *Kelly*, 397 U.S. 254, 263, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970) (Burger, J. and Black, J., dissenting) (quoting *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 168, 95 L. Ed. 817, 71 S. Ct. 624 (1951)). Clearly the line defining property lies somewhere south of interests simply determined, by judicial fiat, to be worthy.

defining, is its holding that such property interests are not derived from the United States Constitution. "Rather they are created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* Lest that tenet be perceived as no more than federal condescension, hollow and brittle, serious consideration of state law must inform any decision that concludes a "property interest" has been "created or defined" by state statute.[8] And the "property interest must be specific and presently enforceable." *Doyle*, 998 F.2d at 1569.

COLO. REV. STAT. § 18-6-803.5(3) (2002), upon which Ms. Gonzales relies, provides (in part):

> (3)(a) Whenever a protection order is issued, the protected person shall be provided a copy of such order.

---

[8] In *Nichols* v. *City of Kirksville*, 68 F.3d 245 (8th Cir. 1995), Nichols claimed that a collective bargaining agreement with the city, which permitted discharge only for cause and established a hearing process, created a protected property right under *Roth*. The Court, looking to Missouri's statutory and case law, decided that Nichols was an at-will employee in spite of the contrary terms of the collective bargaining agreement. The rights secured by the collective bargaining agreement were not enforceable under state law and could not, therefore, be property. *Id.* at 248-49; *see also Flynn*, 83 F.3d 924 (court's administrative order did not give employers property rights in their employment in the face of the state's "at will" statute). In short, without an enforceable remedy there is no property right and it is the obligation of the person claiming the right to establish that it qualifies as property. "No procedural due process claim can exist until a sufficiently certain property right under state law is first shown." *Greenbriar Village, L.L.C.* v. *City of Mountain Brook*, 345 F.3d 1258 (11th Cir.), *reh'g denied*, 83 Fed. Appx. 393, 88 Fed. Appx. 393, 2003 U.S. App. LEXIS 27303 (2003). "There is no reason, however, to restrict the 'uncertainty' that will preclude existence of a federally protectable property interest to the uncertainty that inheres in an exercise of discretion. Uncertainty as to the meaning of applicable law also suffices." *Natale* v. *Town of Ridgefield*, 170 F.3d 258, 263 (2d Cir. 1999) (footnote omitted).

> A peace officer shall use every reasonable means to enforce a protection order.
>
> (b) A peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that:
>
> (I) The restrained person has violated or attempted to violate any provision of the protection order; and
>
> (II) The restrained person has been properly served with a copy of the protection order or the restrained person has received actual notice of the existence and substance of such order.
>
> (c) In making the probable cause determination described in paragraph (b) of this subsection (3), a peace officer shall assume that the information received from the registry is accurate. A peace officer shall enforce a valid protection order whether or not there is a record of the protection order in the registry.[9]

---

[9] The statute merely establishes a process-enforcement by every reasonable means, and to arrest upon information amounting to probable cause that the restraining order has been violated. Both "reasonable means" and "probable cause" are phrases distinctly familiar for their evaluative component, the discretionary element they imply and the deference given to decision makers in the field. If the restraining order had restricted the husband from calling the home and he called one time and immediately hung up, would the police be required to arrest and book him even if they determined he had mistakenly pushed the wrong automatic dialing button and promptly hung up upon discovering his error? If the restraining order established a 100-yard separation distance and investigating officers determined that he inadvertently came within 299 feet and there were no aggravating facts, would an arrest be nevertheless required? If the answer can reasonably be "no" the discretionary element is manifest and the debate becomes one of degree, not of kind. The fact that these officers did nothing is no more significant than if they had acted, but too slowly or

It is a shallow exercise to look at a statute in isolation, apply a simplistic syllogism, conclude the statute confers an entitlement, denominate it property and thereby trigger the panoply of due process protections.[10] That method not only fails to meet *Roth's* promise that federal courts will look to state law as the fountainhead of constitutionally protected property interests, but invites unintended consequences.[11] For instance, the syllogistic approach would logically and equally be applicable to COLO. REV. STAT. § 31-4-112, which provides:

> The marshal or chief of police, or any member of the police force *shall suppress* all riots, disturbances, and breaches of the peace, *shall apprehend* all disorderly

---

ineptly-both courses might be negligence; neither is actionable as a "procedural due process" violation.

[10] This is the lesson of *Sandin* v. *Conner*, 515 U.S. 472, 482-84, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995) (Ginsberg, J., dissenting).

[11] This case imposes liability in a manner the state legislature could not have intended (discussed *infra*). And the mischief is now ready for export. The Colorado statutes contain remarkable language: "[a] protection order issued in the state of Colorado shall contain a statement that: (a) The order or injunction shall be accorded full faith and credit and be enforced in every civil or criminal court of the United States, another state, an Indian tribe, or a United States territory pursuant to 18 U.S.C. sec. 2265." COLO. REV. STAT. § 18-6-803.5(8) (emphasis added). The language echos that of the Model Code on Domestic and Family Violence, drafted by the Advisory Committee and approved by the National Council of Juvenile and Family Court Judges Board of Trustees in 1994.

If the TRO (with its reference to the Colorado statutes-a fact the majority considers significant) is entitled to full faith and credit along with the judicial baggage it now carries, the extraterritorial effect may not be universally extolled. For example, if the beneficiary of a restraining order traveled to Las Vegas, Nevada, pursued there by the restrained spouse in violation of the order, the Las Vegas police, with little, if any, knowledge of Colorado law might not proceed with the vigor the majority demands. In consequence of such ignorance and indolence they might be sued and the City of Las Vegas as well, on a claim of indifference (just as the City of Castle Rock finds itself in this case).

> persons in the city, and *shall pursue and arrest* any person fleeing from justice in any part of the state. He *shall apprehend* any person in the act of committing any offense against the laws of the state or ordinances of the city and, *forthwith and without any warrant*, bring such person before a municipal judge, county judge, or other competent authority for examination and trial pursuant to law.

(Emphasis added.)

I see no language imposing a duty, or establishing rights amounting to an entitlement, in COLO. REV. STAT. § 18-6-803.5 that is not also found in COLO. REV. STAT. § 31-4-112. In fact, COLO. REV. STAT. § 31-4-112 admits to less police discretion. So the syllogism should yield uniform results across the regulated spectrum, perhaps uncomfortably. When police officers break up a barroom fray and all participants promise to behave, if no one was injured the officers might simply dispatch them to their respective homes to sleep it off. Most would agree that prudent husbandry of police resources, good community relations, and a dollop of common sense would not always require the considerable inconvenience and expense occasioned by arrest, transportation, and booking when a citation or a warning would suffice-in spite of clear statutory direction to the contrary. Apparently, the police can now be hauled into federal court if, with the benefit of hindsight, it appears their judgment was flawed and one of the miscreants sent home to ruminate decided instead to resume hostilities. Under the majority decision, the victim would have an "entitlement to enforcement" of the statute (apprehension of the disorderly) because the statute contains "objective predicates" which "mandate the outcome" and "limit discretion." Majority Op., pp. 17-18.

In like vein, COLO. REV. STAT. § 8-4-123 provides:

> (1) The general assembly hereby finds, determines,

and declares that many businesses, such as nursing homes or building management companies, either desire or are required by law to have staff on premises at all times. As part of the compensation for such employees, many employers offer housing to employees. However, once that employment relationship ceases, it may become undesirable for such employees to occupy the premises for many reasons, including the safety of the employer's patients, clients, customers, or tenants.

* * *

(2)(a) . . . A termination of a license to occupy the premises shall be effective three days after the service of written notice of termination of a license to occupy the premises.

* * *

(3) If an employee fails to vacate the premises within three days after the receipt of the notice of termination of the license to occupy the premises, the employer may contact the county sheriff to have the employee removed from the premises. The county sheriff *shall remove* the employee and any personal property of the employee from the premises upon the showing to the county sheriff of the notice of termination of the license to occupy the premises and agreement pursuant to which the license to occupy the premises was granted.

(Emphasis added.) The statute clearly states a purpose, at least in part, to protect patients. The only predicate for the sheriff's required act (removal) is seeing the notice of termination and the underlying agreement. Does the mandatory statutory language coupled with a limitation on discretion create an entitlement to enforcement, and ipso facto a property right, for a resident injured by a holdover staffer whenever the sheriff doesn't act, acts ineptly or too slowly?

When, as the statute says, the sheriff is shown the notice and the agreement, does that end the debate, or would the sheriff be permitted additional inquiry? What kind of hearing might be required and who could participate? And what are the collateral effects?

The majority emphasizes that the TRO triggered the requirements of COLO. REV. STAT. § 18-6-803.5(3). But the fact that a judge made a threshold determination triggering the statutory provisions does not alter the analysis. The state court did not order anyone in the law enforcement community to do anything; it simply paraphrased the statutes in a form notice on the back of the order. Even if it had, independently and specifically, ordered enforcement the only remedy for a breach would be contempt of court. It could not create a private cause of action. The issue is not determined by the court order, but by statute and its resolution bottoms in legislative intent. Even if we presume the Colorado Legislature intended for the law enforcement community to heed its command, that does not imply a purpose to create a private cause of action or other entitlement amounting to a property right. *See infra*, n.15.

Qualified immunity has now been substantially eroded, if not eliminated, in all cases based upon mandatory and directive language contained in a statute. The law enforcement community is now on notice-"shall" means "shall"-and we shall brook no nonsense. Almost any such case, cleverly pled, will survive a motion to dismiss and quite possibly a motion for summary judgment. With the loss of immunity from liability goes the loss of immunity from suit. The rippling effects of what we have done here are obscured by narrow focus-the need for a global approach to the issue of legislative purpose is evident.[12]

---

[12] One might wonder if rights and entitlements could be implied from other Colorado Statutes. For instance, COLO. REV. STAT. § 16-8-115.5

We must look to the entire fabric of Colorado law to determine if specific enforceable rights, qualifying as property, were created by enactment of the statute.[13] If we are to determine whether the Colorado Legislature intended to confer a property right to the holder of a restraining order, a logical starting point is to examine its pronouncements

---

deals with the revocation of a conditional release of mentally ill criminal defendants, and provides in relevant part:

> (3) Whenever the superintendent of the Colorado mental health institute at Pueblo has probable cause to believe that such defendant has become ineligible to remain on conditional release as defined in section 16-8-102(4.5), said superintendent shall notify the district attorney for the judicial district where the defendant was committed. The superintendent or the district attorney *shall apply for a warrant* to be directed to the sheriff or a peace officer in the jurisdiction in which the defendant resides or may be found commanding such sheriff or peace officer to take custody of the defendant.
>
> * * *
>
> (4) The sheriff or peace officer to whom the warrant is directed pursuant to subsection (3) of this section shall take *all* necessary legal action to take custody of the defendant. A sheriff *shall deliver the defendant immediately to the Colorado mental health institute* at Pueblo which shall provide care and security for the defendant.

(Emphasis added.) Would the superintendent and the district attorney be liable, under § 1983, to someone injured by a mentally ill defendant if, having probable cause, they did not apply for a warrant, or did it too slowly? And would the sheriff be liable under § 1983 if deputies failed or hesitated in taking *all* legal action necessary to take the defendant into custody or if they mistakenly took the defendant to a facility other than the Colorado mental health institute in Pueblo?

How far might this reasoning take us? COLO. REV. STAT. § 12-47-301(4)(a) requires that "all sheriffs and police officers *shall see to it* that every person selling alcohol beverages within their jurisdiction has procured a license to do so." (Emphasis added.) Would that provision make state actors liable to the victim of a drunk (or underage) driver who obtained alcohol from an unlicensed vendor?

[13] *See Doyle*, 998 F.2d at 1569; *Nichols*, *infra*, n.6.

starting point is to examine its pronouncements with regard to public liability under state tort law. The Colorado Governmental Immunity Act (the Act), enacted in 1972 in response to the Colorado Supreme Court's abrogation of sovereign immunity in *Evans* v. *Board of County Comm'rs of El Paso County*, 174 Colo. 97, 482 P.2d 968 (Colo. 1971), is distinct and significant, not only because it comprehensively defines and details the circumstances of governmental immunity, but because it explicitly limits those public duties which may be a basis of governmental liability.

> The purpose of the Act is to include,
>
> within one article all the circumstances under which the state, any of its political subdivisions, or the public employees of such public entities may be liable in actions which lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen."

COLO. REV. STAT. § 24-10-102 (emphasis added). Thus, in 1972 the Colorado General Assembly created, of whole cloth, "a statutory scheme whereby claimants with rights to particular causes of action can seek recovery." *Colorado State Claims Bd. of Div. of Risk Mgmt.* v. *DeFoor*, 824 P.2d 783, 792 (Colo.), *cert. denied*, 506 U.S. 981, 121 L. Ed. 2d 387, 113 S. Ct. 483 (1992).[14] In his concurring opinion, Justice Rovira quoted the Act's language, cited above, and concluded a "claimants' right to pursue an action against the state is derived solely from the statutory exceptions listed in the Indemnity Act." *Id.* at 795. Two years later, the Colorado

---

[14] In *DeFoor*, the Colorado Supreme Court, en banc, upheld the constitutionality of the Act regarding its cap on damages. In so doing, it reiterated the history behind the Act. 824 P.2d 783. As an adjunct, the court held that summary judgment was improvidently granted on claimants' § 1983 due process claim. However, in that case there was no question that the claimed property right was recognized both before and after the passage of the Act. *Id.* at 789.

Court of Appeals said the Act "precludes the creation of new duties for public entities or employees, [but] it does not seek to limit prior existing common law duties." *Gallegos* v. *City & County of Denver*, 894 P.2d 14, 19 (Colo. App. 1994). The Act contains not even a hint that a "duty to arrest" could be the basis of an actionable wrong against the instrumentalities of government.[15]

I recognize that constitutional claims find their source separate from the common law principles underpinning tort law and do not suggest the Colorado Governmental Immunity Act controls Ms. Gonzales' claim. *See Ruegsegger* v. *Jefferson County Bd. of County Comm'rs*, 197 F. Supp. 2d 1247, 1265-66 (D. Colo. 1992). However, the fact of governmental immunity from state law suits such as this, the canvas upon which COLO. REV. STAT. § 18-6-803.5(3)(c) was painted, is a powerful instruction as to legislative intent when enacting the statute.

If we presume the legislature is aware of the state of the law when it acts or refrains from action, including interpretive decisions, then an exploration of the state of the law from 1994 through the date of this incident in 1999 should be revealing. Indeed it is. First, the statutory language "shall arrest . . . or seek a warrant," "shall use every reasonable means to enforce," "arrested person shall be removed . . . and shall be taken . . . for booking" could be highly directive without being an actionable wrong against government enti-

[15] In fact, COLO. REV. STAT. § 24-10-106(2) & (3) precludes an interpretation of the Act that results in "a waiver of sovereign immunity where the injury arises from the act, or failure to act, of a public employee [or public entity] where the act is the type of act for which the public employee would be or heretofore has been personally immune from liability." However, the Act does allow a cause of action in those instances where the plaintiff alleges willful and wanton conduct on the part of the state actor.

ties and actors who failed to heed its directives.[16] That is implicit in the legislature's decision not to include such liability in the Act. Second, the Act is constitutional. *DeFoor*, 824 P.2d 783. Third, in 1989, at least two United States Supreme Court cases, *DeShaney* and *Collins*, strongly implied that § 1983 liability would not be the handmaiden of statutes directing government actors as part of a remedy for social ills, be it the abuse of children or of spouses. Fourth, well before this incident, the Colorado Supreme Court uttered a thoughtful and comprehensive opinion closely tracking *DeShaney* and precluding § 1983 liability in cases claiming substantive due process rights. *Henderson* v. *Gunther*, 931 P.2d 1150 (Colo. 1997).

The Colorado legislature's inclusion of the word "shall" simply cannot overcome the pervasive understanding at the time the statute was enacted that law enforcement is not liable for failing to protect citizens from the deliberate actions of third parties, except in very distinct circumstances. Id. And, regardless of its intent, the legislature could not create an actionable right against the police by the enactment of this statute without also amending the Act.[17] The claimed entitlement is not property; it comes so packaged in spite of legislative intent, not because of it. This result is the product of judicial choice.

[16] The pertinent inquiry is not whether the legislature expected the police to follow statutory directives, but if it intended to create a cause of action for abuse victims against communities and law enforcement officers. And if a remedy must necessarily be implied as part of a directive statute, the remedy would have to be administrative (discipline) or political because of the Governmental Immunity Act. *Gallegos*, 894 P.2d at 14. In that regard, I fail to see how the "legislative history" relied upon by the majority informs the debate. The testimony of interested parties at a hearing in one house of a bicameral assembly hardly telegraphs legislative intent. And second- or third-hand newspaper accounts are even less revealing.

[17] *See infra*, n.12.

Against this backdrop, *Sandin* is instructive. 515 U.S. at 482-84. *Sandin* held a prison regulation primarily designed to guide correctional officials in the administration of a prison did not confer a liberty interest on inmates, but attached procedural protections "of quite a different nature." *Id.* at 482. The Court eschewed the methodology employed by the majority here, finding it "shifts the focus of the liberty interest inquiry to one based on the language of a particular regulation, and not the nature of the deprivation." *Id.* The Court identified at least two "undesirable effects" resulting from sole reliance on the language of a particular regulation or statute. First, it creates disincentives for the codification of "procedures in the interest of uniform treatment," even though the regulations may enhance front-line performance in light of competing interests that must be balanced, i.e., the safety of the staff and inmate population. *Id.* Second, to avoid the creation of a protected interest, "states may . . . [have] scarcely any regulations, or . . . [confer] standardless discretion on correctional personnel." *Id.* In addition, the Court noted "the *Hewitt* approach has led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone." *Id.*; *Hewitt* v. *Helms*, 459 U.S. 460, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983). The Court recognized the dissonance of such outcome "to the view . . . that federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment." *Sandin*, 515 U.S. at 482 (citations omitted).

The *Sandin* rationale aptly applies to this case.[18] Undoubtedly, the Colorado legislature wished to address the malevolent effects of domestic violence and encourage uni-

[18] *Sandin* expressly abandoned the syllogistic approach only for prisoner liberty interest claims, leaving the issue open in other cases, much like *DeShaney* left open procedural due process issues. But if principle is to account for anything, *Sandin* demands our attention.

form enforcement when it passed and amended COLO. REV. STAT. § 18-6-803.5. This decision frustrates those purposes and yields a practical anomaly; states which actively promote police involvement in combating domestic violence by employing highly directive language, are subject to § 1983 litigation for their efforts, but states choosing a tepid approach are immune. *Id.* at 489; *cf. Olim* v. *Wakinekona*, 461 U.S. 238, 250, 75 L. Ed. 2d 813, 103 S. Ct. 1741 (1983) (when an administrator has unfettered discretion in making prison transfer there is no liberty interest for the due process clause to protect). Should the majority's approach go national, states may adjust their statutes (not only family violence, but others as well) to avoid federal litigation and potential § 1983 liability, thereby leaving the statutes void of meaningful guidance and subject to uneven application. Additionally, this holding invites lawyers and federal judges to interfere with state efforts at remediation. *Sandin*, 515 U.S. at 482. Finally, it fails to recognize and internalize systemic costs. This decision will encourage others to scour state statutes and regulations in search of mandatory language on which to base their entitlement claims. *Id.* at 481. My efforts in identifying a few statutory candidates merely scratch the surface and we are naive in ignoring the potential problem.

The inability of Ms. Gonzales to state a substantive due process claim does not deprive her of state tort remedies, whatever they may be.[19] *DeShaney*, 489 U.S. 189, 103 L. Ed.

[19] *See Macaluso* v. *Knowles*, 341 N.J. Super. 112,116, 775 A.2d 108 (N.J. Super. App. Div.2001) (no special relationship exception to Tort Claims Act in New Jersey), *overruling Campbell* v. *Campbell*, 294 N.J. Super. 18, 682 A.2d 272 (N.J. Super. L. Div. 1996) (cited by the majority for the proposition that state law analysis admits police officer liability for failure to enforce domestic violence restraining order); *Nearing* v. *Weaver*, 295 Ore. 702, 670 P.2d 137, 143 n.8 (Or. 1983) (duty to arrest domestic order violator not discretionary despite requirement that arrest be supported by probable cause. The court noted, "it would, of course, be desirable if legislatures were to indicate their intention to allow or to

2d 249, 109 S. Ct. 998; *Henderson*, 931 P.2d 1150. The artifice of federalizing state tort law under the rubric of procedural due process is unsettling.

---

withhold the right of those injured by violations of statutes passed for their benefit to recover damages from the violator, if not in each individual statute, than by enacting some general formula . . . ." (internal citations omitted)). The Colorado legislature did so, to no avail.

In *Campbell*, the Superior Court of New Jersey, Law Division, Civil Part, Union County, said:

> A second reason why this immunity for failure to make an arrest is inapplicable is that the restraining order established a "special relationship" between the Plainfield Police and plaintiff, which creates an exception to the immunity statute. The court explained the special relationship exception in *Lee* v. *Doe*, 232 N.J.Super. 569, 557 A.2d 1045 (App.Div.1989).

682 A.2d at 275.

In *Macaluso*, the Superior Court of New Jersey, Appellate Division, said, "it is noteworthy that in *Lee* we upheld the public entity's immunity. *Lee*, *supra*, 232 N.J.Super. at 581, 557 A.2d 1045. The assertion to the contrary in *Campbell* v. *Campbell*, 294 N.J.Super. 18, 25, 682 A.2d 272 (Law Div.1996), is clearly erroneous and should be disregarded." 775 A.2d at 110-11.

The state cases cited by the majority, *Macaluso* and *Nearing* (and, for what it is worth, *Campbell*), address important question of tort liability and immunity therefrom. Those issues are properly left to the states.

Case No. 98 DR 868

TEMPORARY RESTRAINING ORDER PURSUANT TO SECTION 14-10-108, C.R.S.

Jessica Ruth Gonzales – Petitioner,

v.

Simon James Gonzales – Respondent.

TO: _____.

THE COURT FINDS it appropriate to issue this restraining order pursuant to Section 14-10-108, C.R.S. and that irreparable injury would result to the moving party if no order was issued.

IT IS ORDERED THAT:

You may not molest or disturb the peace of the party or of any child.

You may not transfer, encumber, conceal, or in any way dispose of any property, except in the usual course of business or for the necessities of life. You must notify the other party of any proposed extraordinary expenditures and account to the court for all extraordinary expenditures made after this order is issued.

THE COURT FURTHER FINDS that physical or emotional harm would result if you are not excluded from the family home or the home of the other party.

IT IS ORDERED THAT:

You shall not enter the family home or the home of the other party, located at 4949 Wildflowers Wy. Castle Rock CO and shall remain at least 100 yards away from the location at all times.

~~THE COURT FURTHER FINDS that the award of interim legal custody of the child(ren):~~

~~Rebecca Gonzales, born May 20, 1989~~

~~Katheryn N. Gonzlaes, born Oct. 12, 1990~~

~~Leslie O. Gonzales, burn March 20, 1992~~

to the other party is necessary to prevent domestic abuse or prevent the child(ren) from witnessing domestic abuse.

IT IS FURTHER ORDERED THAT:

~~Def.~~ Respondent, within 2 days notice to petitioner, may appear and move for dissolution or modification of this order per CRS 14-10-108(6)

May 21, 1999 /s

Judge

[SEAL]

I certify that this is a true and complete copy of the original order.

May 21, 1999

PLEASE NOTE: IMPORTANT NOTICES FOR RESTRAINED PARTIES AND LAW ENFORCEMENT OFFICIALS ON REVERSE.

JDF 439 2/95 TEMPORARY RESTRAINING ORDER PURSUANT TO SECTION 14-10-108, C.R.S.

WARNING: A KNOWING VIOLATION OF A RESTRAINING ORDER IS A CRIME UNDER SECTION 18-6-803.5, C.R.S. A VIOLATION MAY SUBJECT YOU TO FINES OF UP TO $5,000 AND UP TO EIGHTEEN MONTHS IN JAIL. A VIOLATION WILL ALSO CONSTITUTE CONTEMPT OF COURT. YOU MAY BE ARRESTED WITHOUT NOTICE IF A LAW ENFORCEMENT OFFICER HAS PROBABLE CAUSE TO BELIEVE THAT YOU HAVE KNOWINGLY VIOLATED THIS ORDER. IF YOU VIOLATE THIS ORDER THINKING THAT THE OTHER PARTY OR A CHILD NAMED IN THIS ORDER HAS GIVEN YOU PERMISSION, YOU ARE WRONG, AND CAN BE ARRESTED AND PROSECUTED. THE TERMS OF THIS ORDER CANNOT BE CHANGED BY AGREEMENT OF THE OTHER PARTY OR THE CHILD(REN), ONLY THE COURT CAN CHANGE THIS ORDER. YOU MAY APPLY AT ANY TIME FOR THE MODIFICATION OR DISMISSAL OF THIS RESTRAINING ORDER.

PURSUANT TO SECTION 14-4-102(7.5), C.R.S., IF YOU HAVE BEEN EXCLUDED FROM A SHARED RESIDENCE, YOU MAY GO INTO THE HOME ONCE, IN THE COMPANY OF A LAW ENFORCEMENT OFFICER, TO OBTAIN UNDISPUTED PERSONAL EFFECTS SUFFICIENT TO MAINTAIN A NORMAL STANDARD OF LIVING. YOU MAY NOT GO INTO THE HOME UNLESS A LAW ENFORCEMENT OFFICER IS WITH YOU.

THIS ORDER IS IN EFFECT UNTIL THE DISPOSITION OF THIS ACTION, OR, IN THE CASE OF AN APPEAL, UNTIL THE DISPOSITION OF THE APPEAL.

NOTICE TO LAW ENFORCEMENT OFFICIALS: YOU SHALL USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING ORDER. YOU SHALL ARREST, OR, IF AN ARREST WOULD BE

IMPRACTICAL UNDER THE CIRCUMSTANCES, SEEK A WARRANT FOR THE ARREST OF THE RESTRAINED PERSON WHEN YOU HAVE INFORMATION AMOUNTING TO PROBABLE CAUSE THAT THE RESTRAINED PERSON HAS VIOLATED OR ATTEMPTED TO VIOLATE ANY PROVISION OF THIS ORDER OR HAS RECEIVED ACTUAL NOTICE OF THE EXISTENCE OF THIS ORDER. YOU SHALL ENFORCE THIS ORDER EVEN IF THERE IS NO RECORD OF IT IN THE RESTRAINING ORDER CENTRAL REGISTRY. YOU SHALL TAKE THE RESTRAINED PERSON TO THE NEAREST JAIL OR DETENTION FACILITY UTILIZED BY YOUR AGENCY. YOU ARE AUTHORIZED TO USE EVERY REASONABLE EFFORT TO PROTECT THE ALLEGED VICTIM AND THE ALLEGED VICTIM'S CHILDREN TO PREVENT FURTHER VIOLENCE. YOU MAY TRANSPORT, OR ARRANGE TRANSPORTATION FOR THE ALLEGED VICTIM AND/OR THE ALLEGED VICTIM'S CHILDREN TO SHELTER.

HARTZ, Circuit Judge, dissenting, with whom **TACHA**, Chief Circuit Judge, and **KELLY**, Circuit Judge, join:

The other dissents (with which I agree) have covered the issues well, so I can be brief.

First, Judge O'Brien has demonstrated that to construe the Colorado statute as mandatory produces results that could not have been intended by the legislature. The better reading of the statute is that it is directory, a hortatory expression by the legislature. Professor Kenneth Culp Davis examined "full enforcement" statutes--statutes commanding that law enforcement officers "shall" enforce the criminal law--in his classic book Police Discretion. He concluded that such laws permit the exercise of police discretion regarding

how much, and even whether, to enforce particular criminal statutes. He wrote:

> Although the case for literal interpretation of the full enforcement legislation is both obvious and strong, I believe the case for non-literal interpretation, though far from obvious, is unanswerable, even though it is based on a somewhat sophisticated analysis that may have little appeal to those lawyers and judges who make quick decisions without digging below the surface.

Kenneth C. Davis, Police Discretion 82 (1975). We should be hesitant to read "literally" those similar laws that appear to compel police officers to arrest all violators of particular statutes.

Second, even assuming that the statute created a property interest "owned" by Ms. Gonzales or her children (I agree with Judge Kelly that the order itself could not create a property interest in enforcement of the order by law enforcement officers because public officials were not parties to the proceeding for issuance of the order), I see no violation of procedural due process in this case. The purpose of "procedures" required by procedural due process is to improve how neutral decisionmakers are informed before making a decision. The procedures are to ensure, to the extent appropriate in the circumstances, that the decisionmaker has relevant information for the tasks of finding facts and determining what action is proper in light of those facts. Here, the decisionmaker, a law enforcement officer, needs information to decide (1) whether there is probable cause to believe that the subject of a protective order has violated the order and (2) if so, what is the best response to the violation (an arrest, a warning, or whatever). Given the limited time in which the officer must act, an adversary evidentiary hearing--the gold standard of procedural due process--is not feasible.

In my view, all that procedural due process could require in this context is an opportunity (1) to present evidence of a violation of the order and (2) to argue why an arrest is the proper response to the violation. Ms. Gonzales was given that opportunity. The tragedy is that the decisionmakers did not heed her pleas. But no amount of procedural due process can guarantee that a decisionmaker will make the right decision. Contrary to the analysis of the majority opinion, which sets forth a three-step process for how officers must decide whether to arrest someone, procedural due process is not concerned with how neutral decisionmakers "process" information within their own minds. As Judge McConnell explains, errors by decisionmakers raise questions only of substantive due process.

APPENDIX B

SUPPLEMENTAL ORDER ON REHEARING

United States Court of Appeals

FOR THE TENTH CIRCUIT

Jessica GONZALES, individually and as next best friend of her deceased minor children Rebecca Gonzales, Katheryn Gonzales and Leslie Gonzales,

Plaintiff-Appellant,

v.

CITY OF CASTLE ROCK;
Aaron Ahlfinger; R.S. Brink; Marc Ruisi,
Officers of the Castle Rock Police Department,

Defendants-Appellees.

No. 01-1053

ORDER

Filed April 16, 2004

Appellant shall supplement the appendix in this case with the reverse side of the "Temporary Restraining Order Pursuant to Section 14-10108, CRS" entered by the state court in Castle Rock, CO in the Gonzales case. The front side appears in appellant's appendix. p. 29.

Entered for the Court
Patrick Fisher, Clerk of Court

by: /s
Deputy Clerk

APPENDIX C

ORDER ON REHEARING *EN BANC*

United States Court of Appeals

FOR THE TENTH CIRCUIT

Jessica GONZALES, individually and as next best friend of her deceased minor children Rebecca Gonzales, Katheryn Gonzales and Leslie Gonzales,

Plaintiff-Appellant,

v.

CITY OF CASTLE ROCK;
Aaron Ahlfinger; R.S. Brink; Marc Ruisi,
Officers of the Castle Rock Police Department,

Defendants-Appellees.

No. 01-1053
(D.C. No. 00-D-1285)

ORDER
Filed February 6, 2003

Before **TACHA**, Chief Judge, **SEYMOUR, EBEL, KELLY, HENRY, BRISCOE, LUCERO, MURPHY, HARTZ, O'BRIEN** and **MCCONNELL**, Circuit Judges.

Appellees' petition for rehearing en banc is granted.

In addition to any other issues they may wish to address, the parties shall brief the following:

1) whether CRS 18-6-803.5(3) in combination with the restraining order issued by the Colorado Court created a property interest entitled to due process protection and,

2) if so, what process was due.

Simultaneous briefs shall be filed within 30 days of the date of this order. The parties shall provide 12 copies of their original merits briefs.

Entered for the Court
Patrick Fisher, Clerk of Court

by: /s
Deputy Clerk

APPENDIX D

TENTH CIRCUIT PANEL OPINION

307 F.3d 1258 (CA10 2002)

United States Court of Appeals

FOR THE TENTH CIRCUIT

Jessica GONZALES, individually and as next best friend of her deceased minor children Rebecca Gonzales, Katheryn Gonzales and Leslie Gonzales,

Plaintiff-Appellant,

v.

CITY OF CASTLE ROCK;
Aaron Ahlfinger; R.S. Brink; Marc Ruisi,
Officers of the Castle Rock Police Department,

Defendants-Appellees.

No. **01-1053**
October 15, 2002

Appeal from the United States District Court
for the District of Colorado
(D.C. NO. 00-D-1285)

Brian J. Reichel, Attorney, Thornton, Colorado, for Plaintiff-Appellant.

Thomas S. Rice, Senter Goldfarb & Rice, L.L.C. (Eric M. Ziporin, Senter, Goldfarb & Rice, L.L.C. and Christina M. Habas, Bruno, Bruno & Colin, P.C., with him on the briefs), Denver, Colorado, for Defendants-Appellees.

Before **SEYMOUR, McWILLIAMS** and **GIBSON,*** Circuit Judges.

SEYMOUR, Circuit Judge.

Jessica Gonzales brought this action under 42 U.S.C. § 1983 individually and on behalf of her deceased minor children against the City of Castle Rock, Colorado, and Castle Rock police officers Aaron Ahlfinger, R.S. Brink, and Marc Ruisi. Ms. Gonzales alleged that plaintiffs' substantive and procedural due process rights were violated when defendant police officers failed to enforce a restraining order against her estranged husband, Simon Gonzales, after he abducted the children. While Ms. Gonzales was seeking enforcement of the order, Mr. Gonzales murdered the children. Ms. Gonzales also alleged that the City failed to properly train its police officers with respect to the enforcement of restraining orders and had a custom or policy of recklessly disregarding the right to police protection created by such orders. The district court granted defendants' motion to dismiss, concluding that Ms. Gonzales failed to state a claim under the Fourteenth Amendment for the deprivation of either substantive

---

* The Honorable John R. Gibson, Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

or procedural due process. Ms. Gonzales appeals. We affirm in part, reverse in part, and remand for further proceedings.

I

"In reviewing the grant of a 12(b)(6) motion, we apply the same standards as the district court." *David* v. *City & County of Denver*, 101 F.3d 1344, 1352 (10th Cir. 1996). We accept the well-pleaded allegations in the complaint as true and construe them most favorably to the plaintiff. *Id.* "A complaint may be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) only 'if the plaintiff can prove no set of facts to support a claim for relief.'" *Id.* (quoting *Jojola* v. *Chavez*, 55 F.3d 488, 490 (10th Cir. 1995)). Viewed in this light, the complaint sets out the following tragic facts.

On May 21, 1999, Ms. Gonzales obtained a temporary restraining order against her estranged husband, Simon, in connection with her divorce proceedings. Upon issuance, the order was entered into the central registry of restraining orders, a computerized database accessible to all state and local law enforcement agencies. The order was served on Mr. Gonzales on June 4, 1999, and made permanent on that date. Under the order, Mr. Gonzales was excluded from the family home and was prohibited from molesting or disturbing the peace of Ms. Gonzales and their three daughters, ages ten, nine, and seven. The order allowed Mr. Gonzales parenting time with the girls on alternating weekends and for two weeks during the summer. The order also provided that Mr. Gonzales, "upon reasonable notice, shall be entitled to a mid-week dinner visit with the minor children. Said visit shall be arranged by the parties." Aplt. App. at A-30.

On Tuesday, June 22, 1999, sometime between 5:00 and 5:30 p.m., Simon Gonzales abducted the three girls while they were playing outside their house. Mr. Gonzales had not given advance notice to Ms. Gonzales or arranged with her for a mid-week dinner visit with the children. When Ms. Gonzales discovered the children were gone, she suspected

that Simon, who had a history of suicidal threats and erratic behavior, had taken them. She called the Castle Rock Police Department for assistance at approximately 7:30 p.m. Officers Brink and Ruisi were sent to the Gonzales home, where Ms. Gonzales showed them a copy of the order, requesting that it be enforced and that the children be returned to her immediately. The Officers "stated that there was nothing they could do about the TRO and suggested that Plaintiff call the Police Department again if the three children did not return home by 10:00 p.m." Aplt. App. at A-9.

At about 8:30 p.m., Ms. Gonzales reached Simon on his cell phone and learned that he and the children were at Elich Gardens, an amusement park in Denver. Ms. Gonzales immediately called the Castle Rock police, spoke with Officer Brink, and requested that the police attempt to find and arrest Mr. Gonzales at Elich Gardens. Officer Brink refused to do so and told Ms. Gonzales to wait until 10:00 p.m. to see if Mr. Gonzales returned the children. At shortly after 10:00, Ms. Gonzales called the police to report that the children were still missing and was told by the dispatcher to wait until midnight. At midnight she again called the police and told the dispatcher the children were still gone. At that point, she went to Simon Gonzales' apartment and found that he had not returned. She called the police from the apartment complex and was told by the dispatcher to wait there until the police arrived. No officer ever came and at about 12:50 a.m. she went to the police station and met with Officer Ahlfinger. He took an incident report, but did not attempt to enforce the TRO or to locate the three children.

At approximately 3:20 a.m., Simon Gonzales drove to the Castle Rock Police Station, got out of his truck, and opened fire with a semi-automatic handgun he had purchased shortly after abducting his daughters. He was shot dead at the scene. The police discovered the three girls, who had been

murdered by Simon earlier that evening, in the cab of his truck.

II

We turn first to Ms. Gonzales' claim that defendants violated plaintiffs' rights to substantive due process by failing to enforce the restraining order. The starting point for assessing this claim is the Supreme Court's discussion of the matter in *DeShaney* v. *Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989). There the plaintiff, a child abused by his father, sued social workers and their social services department alleging a substantive deprivation of his liberty interest occasioned by their failure to remove him from his father's custody despite knowledge of the abuse.

In support of her substantive due process claim, Ms. Gonzales points to the Colorado statute describing peace officers' duties with respect to the enforcement of such orders. As the Court indicated in *DeShaney*, however, while this statute is relevant to Ms. Gonzales' procedural due process claim, *see infra*, the language of the Due Process Clause itself must be the source of her substantive claim. *See DeShaney*, 489 U.S. at 195. In rejecting the substantive due process argument, the Court pointed out that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.* at 195.

> If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them. As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.

Id. at 196-97 (footnote omitted).

The Court did recognize "that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals," *id.* at 198, but held that those circumstances arise only "when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself." *Id.* at 200. "The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Id.* The Court also pointed out that although the state may have been aware of the dangers faced by the plaintiff in *DeShaney*, "it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* at 201.

In keeping with the discussion in *DeShaney*, this court and others have recognized two exceptions to the rule that state actors are generally not liable for acts of private violence: "(1) the special relationship doctrine; and (2) the 'danger creation' theory." *Uhlrig* v. *Harder*, 64 F.3d 567, 572 (10th Cir. 1995). Ms. Gonzales does not contend a special relationship was created here by the state's assumption of control over an individual. We therefore turn our attention to the "danger creation" theory, under which a state may be liable for private conduct when it takes affirmative action which creates or increases the danger to the plaintiff. *See Graham* v. *Indep. Sch. Dist. No. I-89*, 22 F.3d 991, 995 (10th Cir. 1994).

> To make out a proper danger creation claim, a plaintiff must demonstrate that (1) the charged state entity and the charged individual actors created the danger or increased plaintiff's vulnerability to the danger in some way; (2) plaintiff was a member of a limited and specifically definable group; (3) defendants' conduct put plaintiff at substantial risk of serious, immediate, and proximate harm; (4) the risk was obvious or known; (5) defendants acted recklessly in conscious disregard of that risk; and (6) such conduct, when viewed in total, is conscience shocking.

Currier v. *Doran*, 242 F.3d 905, 918 (10th Cir. 2001) (citing *Armijo* v. *Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1262-63 (10th Cir. 1998)).

In order to satisfy the first requirement and show that the defendant created the danger or increased the plaintiff's vulnerability to it, a plaintiff must show affirmative conduct on the part of the defendant, *Graham*, 22 F.3d at 995, "that creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger than they otherwise would have been," *Armijo*, 159 F.3d at 1263 (quoting *Reed* v. *Gardner*, 986 F.2d 1122, 1126 (7th Cir. 1993)). If this element is not shown, the substantive due process claim must fail. In assessing this factor, it is important to distinguish between affirmative conduct that creates or enhances a danger and a failure to act that merely does not decrease or eliminate a pre-existing danger. This distinction, while subtle, is critical under *DeShaney* and its progeny.

Ms. Gonzales contends the circumstances here are analogous to those in *Currier* v. *Doran*, 242 F.3d 905 (10th Cir. 2001), in which we held that the plaintiff had set out the requisite affirmative conduct in support of his substantive due process claim. In *Currier*, however, we took great care to point out that "the danger creation theory . . . focuses on the affirmative actions of the state in placing the plaintiff in harm's way." *Id.* at 919. We concluded there that a defendant social worker had acted affirmatively by recommending that a parent be given legal custody of a child despite the defendant's knowledge of evidence and allegations that the parent had previously abused the child. While we observed that the defendant had also failed to investigate or act on the allegations of abuse, we noted that this failure to act "should be

viewed in the general context of the state's affirmative conduct in removing the children from their mother and placing the children with their father." *Id.* at 920 n.7.

Although in the present case Ms. Gonzales attempts to characterize defendants' conduct as affirmative interference with the protection provided by the restraining order, in the end the individual defendants simply failed to act by refusing to enforce the order. Their failure, while it did not reduce the danger posed by Simon Gonzales' abduction of the girls, did not create or enhance that danger. This lack of affirmative conduct is fatal to Ms. Gonzales' substantive due process claim. *See Graham*, 22 F.3d at 995 (substantive due process argument must fail when plaintiffs unable to "point to any affirmative actions by the defendants that created or increased the danger to the victims.").

III

We reach a different result with respect to Ms. Gonzales' procedural due process argument. This claim requires that we address an issue the Supreme Court did not reach in *DeShaney* because it was not timely raised - whether the state statute at issue gives "an 'entitlement' to receive protective services in accordance with the terms of the statute, an entitlement which would enjoy due process protection against state deprivation under our decision in *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972)." *DeShaney*, 489 U.S. at 195 n.2.

In *Roth*, the Court pointed out that "the Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests - property interests - may take many forms." *Roth*, 408 U.S. at 576. Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement

to those benefits." *Id.* at 577. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* When, as here, a plaintiff contends that a constitutionally protected property interest is created by a state statute, we have held that such an interest arises when "the regulatory language is so mandatory that it creates a right to rely on that language thereby creating an entitlement that could not be withdrawn without due process." *Cosco* v. *Uphoff*, 195 F.3d 1221, 1223 (10th Cir. 1999) (per curiam).

Ms. Gonzales relies on the language in the Colorado statute defining the crime of violating a restraining order and the duties of peace officers in that regard. Under that provision, officers "*shall* use every reasonable means to enforce a restraining order," COLO. REV. STAT. § 18-6-803.5(3)(a) (2002) (emphasis added), and "*shall* arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that . . . the restrained person has violated or attempted to violate any provision of a restraining order," *id.* § 18-6-803.5(3)(b)(I) (emphasis added). Ms. Gonzales contends the mandatory nature of the italicized language imposes a mandatory obligation on police officers to enforce the order and to arrest violators, and therefore gives persons with a restraining order a legitimate claim of entitlement to the protection the order is intended to provide.

In making this argument, Ms. Gonzales relies on cases from other jurisdictions holding that a property interest is created in a domestic violence restraining order. For example, in *Siddle* v. *City of Cambridge*, 761 F. Supp. 503 (S.D. Ohio 1991), the court concluded that a protective order obtained pursuant to state law "creates a property right which incurs a duty on the part of the government." *Id.* at 509. The

state statute there provided that "any officer of a law enforcement agency shall enforce a protection order issued . . . by any court in this state in accordance with the provisions of the order." OHIO REV. CODE ANN. § 3113.31(F)(3) (West 2002) (emphasis added). The court observed that holders of protective orders are entitled to greater rights than other citizens and that such an order "would have no valid purpose unless a means to enforce it exists." *Siddle*, 761 F. Supp. at 509.

In *Coffman* v. *Wilson Police Dep't*, 739 F. Supp. 257 (E.D. Pa. 1990), the court held that the state statute governing enforcement of protective orders did not create a property interest in police protection because the statute provided only that an arrest *may* be without a warrant upon violation of the order. But the court did hold that the order itself created an enforceable interest based on its requirement that the appropriate police department *shall* enforce it. *Siddle* and *Coffman* thus both hold that use of the word "shall" to impose a mandatory duty on police to enforce a protective order creates a legitimate claim of entitlement to, and thus a protected property interest in, the protection provided by the order. "The word 'shall' is mandatory, not precatory, and its use in a simple declarative sentence brooks no contrary interpretation." *Id.* at 264.

In our case, the governing statute provides that an officer *shall* use every reasonable means to enforce an order and shall arrest a restrained person when the officer has information amounting to probable cause that the person has violated the order. The district court concluded that, notwithstanding the mandatory language used in the statute, no legitimate claim of entitlement to the enforcement duties set out therein could arise because those duties are only triggered when probable cause exists to believe that the restraining order has been violated. In the district court's view, determination of

the existence of probable cause is discretionary and therefore cannot be the predicate for a mandatory duty. We disagree.

The Colorado courts have stated unambiguously that in Colorado statutes, "shall" does in fact mean "shall." "The word 'shall,' when used in a statute, involves a 'mandatory connotation' and hence is the antithesis of discretion or choice." *Colorado* v. *Guenther*, 740 P.2d 971, 975 (Colo. 1987); *see also Allison* v. *Indus. Claim Appeals Office*, 884 P.2d 1113, 1119-20 (Colo. 1994); *Hernandez* v. *District Court*, 814 P.2d 379, 381 (Colo. 1991). Moreover, the legislative history of the statute at issue clearly indicates that the legislature intended to impose a mandatory obligation on the police as well as on others involved in the criminal justice system who deal with domestic abuse.

> First of all, . . . the entire criminal justice system must act in a consistent manner, which does not now occur. *The police must make probable cause arrests.* The prosecutors must prosecute every case. Judges must apply appropriate sentences, and probation officers must monitor their probationers closely. And the offender needs to be sentenced to offender-specific therapy.
>
> So this means the entire system must send the same message and enforce the same moral values, and that is abuse is wrong and violence is criminal. And so we hope that House Bill 1253 starts us down this road.

Brief of Aplt, attach., transcript of Colorado House Judiciary Committee Hearings on House Bill 1253, Feb. 15, 1994, at 3 (emphasis added).

Under the statute here, "[a] peace officer shall use every reasonable means to *enforce* a restraining order." COLO. REV. STAT. § 18-6-803.5(3)(a)(2002) (emphasis added). This mandatory duty is not premised upon the existence of probable cause, presumably because an arrest is not always necessary to enforce a restraining order. Moreover, the fact that

the officer's mandatory duty extends only to the use of every reasonable means of enforcement does not negate a legitimate claim of entitlement to the use of those means. *See Siddle*, 761 F. Supp. at 509 (holding that property interest in enforcement extends to reasonable efforts under the circumstances).[1]

The complaint in this case, viewed favorably to Ms. Gonzales, indicates that defendant police officers used no means, reasonable or otherwise, to enforce the restraining order. Under these circumstances, we conclude that Ms. Gonzales has effectively alleged a procedural due process claim with respect to her entitlement to enforcement of the order by every reasonable means.

The statute also imposes a duty on peace officers to *arrest* "when the peace officer has information amounting to probable cause" that the restrained person has violated or attempted to violate the restraining order. COLO. REV. STAT. § 18-6-803.5(3)(b)(2002). We do not agree with the district court that because the officer's mandatory duty to arrest only arises upon the existence of facts giving rise to probable cause, no legitimate claim of entitlement can ever exist. In our view, the statute clearly creates a mandatory duty to arrest when probable cause is present. It follows that the holder of an order has a legitimate claim of entitlement to the protection provided by arrest when the officer has information amounting to probable cause that the order has been violated.

[1] We do not imply that every use of the word "shall" in a statute will support a procedural due process claim. For example, a property right enforceable by the procedural due process clause requires that the "shall" language in a statute mandate a specific substantive outcome rather than merely referring to procedures. *See, e.g., Doe* v. *Milwaukee County*, 903 F.2d 499, 502-04 (7th Cir. 1990); *cf. Doyle* v. *Okla. Bar Ass'n*, 998 F.2d 1559, 1570 (10th Cir. 1993) (same re liberty interest). Here, however, the statute mandates not merely a procedure, but a specific outcome, enforcement of a restraining order.

The existence of probable cause is an objectively ascertainable matter evaluated on the basis of what a reasonably well-trained officer would know. *See Malley* v. *Briggs*, 475 U.S. 335, 345, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986); *United States* v. *Davis*, 197 F.3d 1048, 1051 (10th Cir. 1999). It therefore is not a matter committed to the officer's subjective discretion. *See Nearing* v. *Weaver*, 295 Ore. 702, 670 P.2d 137, 142 & n.7 (Ore. 1983) (duty to arrest domestic order violator not discretionary despite requirement that arrest be supported by probable cause); *Campbell* v. *Campbell*, 294 N.J. Super. 18, 682 A.2d 272, 274-75 (N.J. Super. Ct. Law Div. 1996) (same).

Our review of the complaint in the light most favorable to Ms. Gonzales reveals that she has stated a procedural due process claim with respect to her entitlement to have Simon Gonzales arrested. She alleged that under the restraining order, Simon Gonzales was entitled to a mid-week dinner visit only upon reasonable notice and arrangement between the parties, and that no notice or arrangement had preceded his abduction of the children. She alleged that she showed defendant officers the order and told them that Simon had taken the children in violation of its provisions. These allegations, along with the invocation of the state statute defining the duties of peace officers with respect to the violation of protective orders, set out a constitutional deprivation sufficient to withstand a motion to dismiss under Fed. R. Civ. P. 12(b)(6).

Accordingly, we reverse the district court's decision that Ms. Gonzales has failed to state a claim and remand for further proceedings in light of this opinion.[2] The City's argu-

[2] Defendants have filed a motion to strike documents attached by Ms. Gonzales to her brief on appeal. These materials, which consist of three state statutes and their legislative history, are required under the rules. *See* FED. R. APP. P. 28(f). Moreover, they are properly subject to judicial notice under Fed. R. Evid. 201, which may be taken at any stage in the

ment that Ms. Gonzales could not establish municipal liability and the individual defendants' contention that they are entitled to qualified immunity are matters to be considered in the first instance by the district court on remand.

REVERSED and **REMANDED** for further proceedings.

---

proceedings. *See United States* v. *One (1) 1975 Thunderbird 2-Door Hardtop* , 576 F.2d 834, 836 (10th Cir. 1978) (judicial notice of state statutes); *Adarand Constr., Inc.* v. *Slater*, 228 F.3d 1147, 1168 n.12 (10th Cir. 2000) (judicial notice of content of hearings before legislative committees). Accordingly, defendants' motion is denied.

APPENDIX E
DISTRICT COURT OPINION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Wiley Y. Daniel

Civil Action No. 00-D-1285

JESSICA GONZALES, individually and as next best friend to her deceased minor children REBECCA GONZALES, KATHERYN GONZALES and LESLIE GONZALES,

Plaintiff,

v.

CITY OF CASTLE ROCK, and AARON AHLFINGER, R.S. BRING, and MARC RUISI, Officers of the City of Castle Rock Police Department,

Defendants.

ORDER

THIS MATTER is before the Court on Defendants' Motion to Dismiss filed August 7, 2000. The Motion urges that the causes of action contained in the Complaint fail to state claims upon which relief can be granted. I held a hearing on this Motion on Thursday, January 4, 2001 and took the matter under advisement.

FACTUAL BACKGROUND

Plaintiff Jessica Gonzales is the mother of deceased minor children, Rebecca, Katheryn and Leslie Gonzales. In May 1999 Plaintiff obtained a temporary restraining order ("TRO") against her estranged husband, Simon Gonzales, which prevented him from molesting or disturbing the peace of Plaintiff or her three children. The TRO was served on Simon and, by stipulation, was made permanent as of June 4, 1999. The permanent order provided Simon with certain "parenting time" with the children, which included a pre-arranged, advance notice mid-week dinner visit.

On Tuesday, June 22, 1999, Simon Gonzales abducted the three children from Plaintiff's home. No advance notice or arrangements were made for Simon to have "parenting time" with the children that evening. Plaintiff called the Castle Rock Police Department for assistance at approximately 7:30 p.m. Two polices officers, Defendants Brink and Ruisi were dispatched to Plaintiff's home. She showed them the TRO, told them Simon had taken the children, and requested that the TRO be enforced. Brink and Ruisi told Plaintiff there was nothing that they could do, and suggested that Plaintiff contact the Police Department if the children were not home by 10:00 p.m.

At approximately 8:30 p.m., Plaintiff confirmed that Simon Gonzales had the children by contacting him on his cellular telephone. Simon told Plaintiff that he and the children were at Elitch Gardens amusement park in Denver. Plaintiff called the Police Department and requested that Brink have someone check for Simon or his vehicle at Elitch Gardens. Brink told the Plaintiff to wait until 10:00 p.m. At 10:10 p.m., Plaintiff again called the Police Department to report that he children had not been returned. She then went to Simon's apartment and called the Police Department. She was told to wait there for an officer, but none came. At approximately 12:50 a.m., Plaintiff went to the Police Station and filled out an incident report.

Over an eight hour period, Plaintiff repeatedly asked Defendants to enforce the TRO and retrieve the children. Defendants repeatedly told Plaintiff to wait and did nothing to enforce the TRO or locate the children. At approximately 3:20 a.m. on June 23, 1999, Simon drove to the Castle Rock police station and opened fire on the station with a semi-automatic handgun. Police shot and killed Simon. The three girls were found murdered in the cab of Simon's truck.

SUMMARY OF COMPLAINT ALLEGATIONS

Plaintiff's Complaint alleges due process and 42 U.S.C. § 1983 violations stemming from the alleged failure of Defendants City of Castle Rock and police officers in the Castle Rock Police Department to enforce the TRO against Simon. Plaintiff argues that the TRO created a property right under the Fourteenth Amendment, and in turn created a constitutional duty on behalf of Defendants to enforce the TRO. Plaintiff further argues that section 18-6-803.5(3) of the Colorado Revised Code required the Defendants to use "every reasonable means to enforce" the TRO and "arrest" or "seek a warrant for the arrest of" Simon Gonzales for his violations of the TRO. COLO. REV. STAT. § 18-6-803.5(3) (1999). Plaintiff alleges that Defendants failure to enforce the TRO constituted a denial of both her substantive and procedural due process rights pursuant to 42 U.S.C. § 1983.

STANDARD OF REVIEW

In deciding a Motion to Dismiss, the court "must accept all the well-pleaded allegations as true and must construe them in the light most favorable to the plaintiff." David v. City and County of Denver, 101 F.3d 1344, 1352 (10th Cir. 1996), cert. denied, 118 S.Ct. 157 (1997) (quoting Gagan v. Norton, 35 F.3d 1473, 1474 n. 1 (10th Cir. 1994). "A complaint may be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) only 'if the plaintiff can prove no set of facts to support a

claim for relief.'" Id. (quoting Jojola v. Chavez, 54 F.3d 488, 490 (10th Cir. 1995).

Defendants seek dismissal of the Complaint for failure to state a claim for relief pursuant to Rule 12(b)(6). The individual Defendants also seek dismissal arguing that they are entitled to qualified immunity; Castle Rock seeks dismissal arguing that Plaintiff has failed to allege facts sufficient to support a municipal liability claim.

DUE PROCESS CLAIMS

To sustain an action under 42 U.S.C. § 1983 a plaintiff must show (1) that the conduct complained of was committed by a person acting under the color of state law and (2) that the conduct deprived the plaintiff of a constitutional right. See Blum v. Yaretsky, 457 U.S. 991, 1002 (1982). The parties do not dispute that Defendants were acting under the color of state law. The issue is whether their conduct deprived Plaintiff of a constitutional right.

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. Plaintiff contends that § 14-10-108 of the Colorado Revised Statutes is the basis for a property interest which is protected by due process. Under § 14-10-108, a party to proceedings for dissolution of marriage may obtain a temporary order "[e]njoining a party from molesting or disturbing the peace of the other party or of any child." Plaintiff sought and obtained such an order in this case (the TRO). The TRO was made permanent and served on Simon Gonzales on June 4, 1999.

The means to enforce a TRO issued pursuant to § 14-10-108 is established by § 18-6-803.5(3) of the Colorado Revised Statutes which provides that

> (a) Whenever a restraining order is issued, the protected person shall be provided with a copy of such order. A peace officer shall use every reasonable means to enforce a restraining order. (b) A peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that:
>
> (I) The restrained person has violated or attempted to violate any provision of a restraining order; and
> (II) The restrained person has been properly served with a copy of the restraining order or the restrained person has received actual notice of the existence and substance of such order.

COLO. REV. STAT. § 18-6-803.5(3) (1999).

Even when there is a protectable property interest, the Due Process Clause does not generally confer an "affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." DeShaney v. Winnebago, 489 U.S. 189, 196 (1989).

Substantive Due Process

Substantive Due Process protects people from arbitrary and unreasonable action that deprives them of life, liberty, or property. Plaintiffs contends that the State,[1] by its inaction, arbitrarily deprived her of a property interest created by the TRO. The starting point for analyzing the validity of Plaintiff's substantive due process claim is DeShaney v. Winnebago, where the Supreme Court held that the Constitution only

---

[1] As used here, the term "State" refers generically to state and local governmental entities and their agents.

> imposes upon the State affirmative duties of care and protection with respect to particular individuals . . . when the State by the affirmative exercise of its power so restrains an individuals liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs.

Id. at 198 & 200. Even if the State knows of an individual's predicament or expresses intent to help an individual, its failure to protect does not violate substantive due process. Id. at 198. Instead, "[t]he affirmative duty to protect arises . . . from the limitation which [the State] has imposed on [an individual's] freedom to act on his own behalf." Id.

In this case, it is clear that the State imposed no such limitation. The harms suffered by Plaintiff and her children occurred not while they were in the State's custody, but instead, while the children were in the custody of their father. As in DeShaney, "[w]hile the State may have been aware of the dangers that [the children] faced in the free world, it played no part in their creation, nor did it do anything to render [them] any more vulnerable to them." Id. at 201.

The Tenth Circuit has recognized two exceptions to the general DeShaney rule: (1) the special-relationship doctrine, and (2) the danger-creation theory. Uhlrig v. Harder, 64 F.3d 567, 572 (10th Cir. 1995). Consistent with DeShaney, both exceptions apply only where the State creates the danger. The special-relationship doctrine "requires that a plaintiff must show involuntary restrain by the government . . . if there is no custodial relationship there can be no constitutional duty." DeAnzona v. City and County of Denver, 222 F.3d 1229, 1234 (10th Cir. 2000); see also Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir. 1993) (citations omitted).

Under the danger creation theory, a state may be liable for an individual's safety only "if it created the danger that harmed the individual" Uhlrig, 64 F.3d at 572. Plaintiff must establish that:

> (1) [Plaintiff and her children] were members of a limited and specifically definable group; (2) Defendants' conduct put [Plaintiff and her children] at substantial risk of serious, immediate and proximate harm; (3) the risk was obvious or known; (4) Defendants acted recklessly in conscious disregard of that risk; and (5) such conduct, when viewed in total, is conscience shocking.

Id. at 574. To satisfy the "shock the conscience" standard, plaintiff must demonstrate "a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking." Id. at 574. This requires more than a showing that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power. See id. A plaintiff must show that defendants' affirmative acts subjected plaintiff to the injury-causing danger. See Graham v. Independent School Dist., No. 1-89, 22 F.3d 991, 995 (10th Cir. 1994).

"'Inaction by the state in the face of a known danger is not enough . . . the state must have limited in some way the liberty of a citizen to act on his own behalf.'" Id. at 994 (quoting Reed v. Gardner, 986 F.2d 1122, 1125 (7th Cir. 1993)), cert. denied, 510 U.S. 947 (1993). Moreover, "foreseeability [on the part of the state] cannot create an affirmative duty to protect when plaintiff remains unable to allege a custodial relationship." Id. at 994.

Applying the foregoing principles to the facts as alleged in the Complaint, I find that Plaintiff has failed to state a claim. Plaintiff does not allege that Defendants affirmatively created the danger which was posed to Plaintiff and her children nor does she allege a custodial relationship. Instead, Plaintiff alleges Defendants' inaction and failure to enforce the TRO as the basis for her claim. Inaction, however, is not enough. Plaintiff argues that reckless inattention to the TRO

and enforcement mechanism in § 18-6-803.5(3) created the possibility of danger to she and her children. Such facts do not rise to the level of conscience-shocking affirmative conduct or indifference. The childrens' deaths are simply "too remote a consequence of [defendants'] action to hold them responsible under the federal civil rights law." Graham, 22 F.3d at 995 (quotation omitted). Accordingly, Plaintiff has not alleged facts which support a violation of the substantive due process clause and I will GRANT the Motion to Dismiss as to Plaintiff's substantive due process claim.

Procedural Due Process

Procedural Due Process protects individuals from deprivation of life, liberty or property without appropriate procedural safeguards. See Board of Regents of State Colleges v. Roth, 408 U.S. 574 (1972).[2] Plaintiff argues that the State, by failing to enforce the TRO as required by § 18-6-803.5(3), deprived her of the property interest created by the TRO without proper procedure such as notice and/or a hearing to vacate the TRO.

"A property interest protected by the due process clause results from a legitimate claim of entitlement created and defined 'by existing rules or understandings that stem from an independent source such as state law.'" Jacobs, Visconsi & Jacobs v. City of Lawrence, 927 F.2d 1111, 1116 (10th

[2] Plaintiff argues that DeShaney governs both the substantive and procedural due process claims. The Court in DeShaney, however, explicitly limited its holding to substantive due process. 489 U.S. 189, 195 (1989) (finding that the claim at issue was "one invoking the substantive rather than the procedural Due Process Clause"). Plaintiff in DeShaney sought to raise a procedural due process argument, but the Court expressly declined to consider it because it was untimely. Id. at 195 n2. As a result, while I acknowledge that the Court's opinion in DeShaney is somewhat confusing in that it at some points discusses "due process" without explicit limitation to the substantive component, it would be inapposite for me to extend DeShaney to procedural due process given that the Court explicitly declined to examine procedural due process issues.

Cir. 1991) (quoting Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)). Whether § 18-6-803.5(3) gives rise to a legitimate claim of entitlement depends upon whether "the regulatory language [is] so mandatory that it creates a right to rely on that language thereby creating an entitlement that could not be withdrawn without due process." Cosco v. Uphoff, 195 F.3d 1221, 1223 (10th Cir. 1999).[3]

[3] Plaintiff urges the Court to follow Siddle v. City of Cambridge, 761 F. Supp. 503 (S.D. Ohio 1991), and Coffman v. Wilson Police Dept., 739 F. Supp. 257 (E.D. Pa. 1990) to find that the TRO and enforcement statute created within Plaintiff a protectable property interest. In Siddle, the District Court in the Southern District of Ohio found that a protective order, such as the one in this case, "creates a property right which incurs a duty on the part of the government." 761 F.Supp. at 509. "[T]he government's failure to adequately perform this duty may constitute a denial of a right to procedural due process." Id. The Court in Coffman reached the same conclusion by determining that protective orders create special relationships which, when served on the police department, "create [ ] a Roth property interest that could only be removed through due process of law (here, presumably a hearing on the motion to vacate protective order)." 739 F. Supp. at 265.

The 10th Circuit has not recognized the reasoning in either Siddle or Coffman. No Colorado law analogous to Siddle and Coffman holds that a valid protective order creates a property interest that can only be removed through due process of law. Instead, Cosco v. Uphoff, 195 F.3d 1221, 1223 (10th Cir. 1999), governs the determination of whether a statute creates a protectable interest within an individual such that the individual's interest is afforded procedural due process protection.

Moreover, I note that this case is factually distinguishable from both Siddle and Coffman. In Siddle, the very statute authorizing the protective order provided the enforcement mechanism, specifically, that an "officer of a law enforcement agency shall enforce a protection order." 761 F. Supp. at 508 – 09; OHIO REV. CODE § 3113.31 (1991). By contrast, Colorado has separate statutes which authorize a protective order and then provide an enforcement mechanism. The Coffman Court found that a property interest was created where the protective order was "properly served upon the [Police] Department." 739 F. Supp. at 265. Also, the Court noted that the "special relationship" created by the protective

Defendants argue that the regulatory language in § 18-6-803.5(3) is not "mandatory" as described in Cosco because its obligations are triggered only when there is probable cause to believe the restraining order has been violated. While it is true that probable cause is measured against an objective standard, see Beck v. Ohio, 379 U.S. 89, 96 (1964), the process of determining whether probable cause exists implicitly requires that police officers exercise discretion. Because the statute requires that police exercise discretion, its obligations are, by definition, not mandatory.

Because the obligation imposed by § 18-6-803.5(3) is not mandatory under Cosco, I am unable to conclude that Plaintiff had a protectable property interest. Accordingly, Plaintiff has not alleged facts which support a violation of the procedural due process clause and I will GRANT the Motion to Dismiss as to Plaintiff's procedural due process claim.

CONCLUSION

The individual Defendants seek dismissal of the claims against them on the basis of qualified immunity. The City of Castle Rock seeks dismissal of the claims against it on the ground that Plaintiff cannot establish municipal liability. Because I find that Plaintiff has failed to state a claim upon which relief can be granted, I will not address these arguments.

The tragic facts of this case make the conclusion that Plaintiff has not cause of action for violation of her federal

---

order arose as a matter of Pennsylvania state law. Id. at 265 and n9. In this case, there is no evidence or argument that the TRO was "properly served" upon the Castle Rock police department. Moreover, there is no indication that Colorado law is sufficiently analogous to Pennsylvania law such that I would be warranted in finding that the TRO created a "special relationship" giving rise to a property interest.

constitutional rights under 42 U.S.C. § 1983 a troubling one. It is appropriate to repeat the Court's remarks in DeShaney,

> Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for [the deceased children] and [their] mother to receive adequate compensation for the grievous harm inflicted upon them. But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the [Defendants], but by [Simon Gonzales].

489 U.S. at 202 – 03. Accordingly, it is

ORDERED that Defendants' Motion to Dismiss is **GRANTED**. It is

FURTHER ORDERED that this case is **DISMISSED WITH PREJUDICE**, each party to bear its own costs and attorneys fees.

Dated: January 22, 2001

BY THE COURT:
/s
Wiley Y. Daniel
U.S. District Judge

APPENDIX F
COMPLAINT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 00-D-1285

JESSICA GONZALES, individually and as next best friend to her deceased minor children REBECCA GONZALES, KATHERYN GONZALES and LESLIE GONZALES,

Plaintiff,

v.

CITY OF CASTLE ROCK, and AARON AHLFINGER, R.S. BRINK, and MARC RUISI, Officers of the City of Castle Rock Police Department,

Defendants.

COMPLAINT AND JURY DEMAND

Plaintiff, through her undersigned counsel and for her Complaint against the Defendants, alleges as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff Jessica Gonzales is the mother of Rebecca, Katheryn and Leslie Gonzales who are now deceased and were affectionately referred to as "three peas in a pod" [hereinafter, "the three children" or "the three girls"]. Plaintiff resides at 4943 Wild Flowers Way, Castle Rock, Colorado.

2. Defendant City of Castle Rock ("City") is a municipality located in Douglas County, Colorado.

3. Defendants Aaron Ahlfinger, R.S. Bring and Marc Ruisi are individuals residing in Castle Rock, Colorado and, at all times pertinent hereto, were employed and acting within the scope of their authority as City of Castle Rock police officers.

4. The jurisdiction of this Court is properly invoked under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 in that all of the Defendants reside in this district and all of the events or omissions giving rise to Plaintiff's claims occurred in this district.

GENERAL ALLEGATIONS

6. On May 21, 1999, Plaintiff, in connection with her divorce proceedings, obtained from Douglas County, Colorado District Court a temporary restraining order against her estranged husband, Simon Gonzales (the "TRO"). At the time of its issuance, the TRO was entered by the state court into the Colorado Bureau of Investigation's central registry of restraining orders, which is a computerized database registry accessible to any state or local law enforcement agency, including the Castle Rock Police Department.

7. Among other things, the TRO ordered Simon Gonzales not to molest or disturb the peace of Plaintiff or the three children, and it excluded Simon Gonzales from Plaintiff's home.

8. The TRO was duly served on Simon Gonzales on June 4, 1999.

9. Effective as of June 4, 1999, the state court, upon the stipulation of the parties, made the TRO permanent with the exception of allowing Simon Gonzales to pick up the three

children for "parenting time" purposes, which was specified as alternating weekends commencing after work on Friday evening and continuing through 7:00 p.m. on Sunday evening, a pre-arranged, advance notice mid-week dinner visit, and two non-consecutive weeks during the summer.

10. Sometime between approximately 5:00 and 5:30 p.m. on Tuesday, June 22, 1999, unbeknownst to Plaintiff at the time, Simon Gonzales abducted the three girls while they were playing outside their house. No advance notice or arrangements had been made by Simon Gonzales with Plaintiff to have any parenting time with the three children for that evening.

11. When Plaintiff noticed the three children were gone, she suspected that Simon Gonzales, who had a history of suicidal threats and erratic behavior, had taken them and, at approximately 7:30 p.m., she telephoned the Castle Rock Police Department for assistance.

12. In response to Plaintiff's call, Defendant Brink and Ruisi were dispatched. When they arrived at Plaintiff's home, she showed them a copy of the TRO and requested that it be enforced and the three children be returned to her immediately. Defendants Brink and Ruisi stated that there was nothing they could do about the TRO and suggested that Plaintiff call the Police Department again if the three children did not return home by 10:00 p.m.

13. At approximately 8:30 p.m., Plaintiff reached Simon Gonzales on his cellular telephone and he told her that he had the three children and was at Elitch Gardens amusement park in Denver. Plaintiff immediately called the Castle Rock Police Department and was put in touch by telephone with Defendant Brink. Plaintiff requested that Defendant Brink have someone check for Simon Gonzales or his vehicle at Elitch Gardens and put out an APB for Simon Gonzales, but Defendant Brink refused to do so. Instead, he told Plaintiff

to wait until 10:00 p.m. and see if Simon Gonzales returned the three girls home.

14. At approximately 10:10 p.m., Plaintiff again called the Castle Rock Police Department and advised the dispatcher that the three children were still missing, but she was again told to wait, this time until midnight.

15. At midnight, Plaintiff called the Castle Rock Police Department and advised the dispatcher that the three children were still missing. Plaintiff then went to Simon Gonzales' apartment. Finding that Simon Gonzales was still not home, at approximately 12:10 a.m. Plaintiff called the Castle Rock Police Department from Simon Gonzales' apartment complex on her cellular telephone and was advised by the dispatcher to wait there for a police officer to arrive. No police officer ever came and, at approximately 12:50 a.m. Plaintiff went to the Castle Rock police station. There she met with Defendant Ahlfinger who took an incident report from her. Ahlfinger made no reasonable effort to enforce the TRO or locate the three children. Instead, he went to dinner.

16. At approximately 3:20 a.m. on Wednesday, June 23, 1999, Simon Gonzales drove to the Castle Rock police station, got out of his truck, and opened fire on the station with semi-automatic handgun he had purchased earlier that evening, shortly after he abducted the three girls. Simon Gonzales was shot dead by police officers on the scene. The corpses of the three girls (ages 10, 9 and 7), who had been murdered by Simon earlier that evening, were found by the police in the cab of Simon's truck.

COUNT I

(Due Process Clause of the United States Constitution and § 1983 – Against all Defendants)

17. Plaintiff repeats and re-alleges paragraphs 1 through 16, above.

18. The TRO created a property right that incurred a duty on the part of the Defendants to protect Plaintiff and the three children.

19. Pursuant to C.R.S. § 18-6-803.5(3), the Defendants were required by law to protect Plaintiff and the three children by using "every reasonable means to enforce" the TRO and to "arrest" or "seek a warrant for the arrest of" Simon Gonzales for his violations of the TRO.

20. Defendants, acting under color of law, knowingly failed to perform their duties to Plaintiff and the three children to protect them from, arrest or restrain Simon Gonzales, and such failure constituted a denial of the due process rights of Plaintiff and the three children in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

21. The Defendants' actions were taken either willfully, recklessly or with such gross negligence as to indicate wanton disregard and deliberate indifference to the civil rights of Plaintiff and the three children.

22. As a direct and proximate result of the Defendants' wrongful actions, Plaintiff's three daughters were murdered and Plaintiff has suffered extreme emotional distress, grief, sorrow, loss of companionship, and pain and suffering.

23. Pursuant to 42 U.S.C. § 1988, Plaintiff is entitled to recover form the Defendants her reasonable attorney's fees incurred in connection with this Count.

COUNT II

(Due Process Clause of the United States Constitution and § 1983 – Against the City)

24. Plaintiff repeats and re-alleges paragraphs 1 through 23, above.

25. The City of Castle Rock, through its police department, has created an official policy or custom of failing to respond properly to complaints of restraining order violations.

26. The City, through its police department, failed to train their officers properly as to how they should respond to complaints of restraining order violations, and this policy is motivated by a deliberate indifference to the rights of persons with whom its police officers come in contact.

27. The City's police department maintains an official policy or custom that recklessly disregards a person's rights to police protection with respect to restraining orders, and provides for or tolerates the non-enforcement of restraining orders by its police officers, in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

28. The City's actions were taken either willfully, recklessly or with such gross negligence as to indicate wanton disregard and deliberate indifference to the civil rights of Plaintiff and the three children.

29. As a direct and proximate result of the City's wrongful actions, Plaintiff's three daughters were murdered and Plaintiff has suffered extreme emotional distress, grief, sorrow, loss of companionship, and pain and suffering.

30. Pursuant to 42 U.S.C. § 1988, Plaintiff is entitled to recover from the City her reasonable attorney's fees incurred in connection with this Count.

WHEREFORE, Plaintiff respectfully requests that judgment enter in her favor and against Defendants for damages in amounts to be proven at trial, but currently estimated to be not less than $30 million, together with punitive damages, applicable pre- and post-judgment interest, attorney's fees

and court costs, and such other relief as the Court deems proper.

JURY DEMAND

PLAINTIFF HEREBY DEMANDS A JURY TRIAL ON ALL ISSUES SO TRIABLE.

Dated this 23rd day of June, 2000.

Respectfully submitted,

LAW OFFICE OF BRIAN J. REICHEL

By: /s/ Brian J. Reichel
Brian J. Reichel, #20456
3879 East 120th Avenue, #156
Thornton, Colorado 80233
(303) 252-1052

David T. Odom, Esq.
DAVID T. ODOM & ASSOCIATES, P.C.
311 South Wacker Drive, Suite 4550
Chicago, Illinois 60606
(312) 444-1955

ATTORNEYS FOR PLAINTIFF

Plaintiff's Address:
4943 Wild Flowers Way
Castle Rock, CO 80104

(21)

No. 04-278

Supreme Court, U.S.
FILED
SEP 29 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHERYN GONZALES, AND LESLIE GONZALES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

BRIAN J. REICHEL
Counsel of Record
LAW OFFICE OF BRIAN J. REICHEL
5023 West 120th Avenue, #326
Broomfield, CO 80020
303-465-9034

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
ARGUMENT	2
I. THERE IS NO COMPELLING REASON TO GRANT CERTIORARI	2
II. NO CIRCUIT CONFLICT EXISTS	4
A. Petitioner Mischaracterizes the Issue Actually Decided by the Tenth Circuit	4
B. The Circuit Conflict Alleged by Petitioner is Illusory	7
III. THE TENTH CIRCUIT DID NOT DECIDE ANY UNSETTLED IMPORTANT QUESTION OF FEDERAL LAW REGARDING THE KIND OF PROCESS DUE A HOLDER OF A RESTRAINING ORDER IN COLORADO	9
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 3, 4, 8

Coffman v. Wilson Police Dep't, 739 F. Supp. 257 (E.D. Pa. 1990) 2

Cosco v. Uphoff, 195 F.3d 1221 (10th Cir. 1999) 5

DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989) 3

Doe by Fein v. District of Columbia, 93 F.3d 861 (D.C. Cir. 1996) 7

Doe by Nelson v. Milwaukee County, 903 F.2d 499 (7th Cir. 1990) 7

Doe v. Hennepin County, 858 F.2d 1325 (8th Cir. 1988) 8

Gonzales v. City of Castle Rock, 366 F.3d 1093 (10th Cir. 2004) 5, 6, 7

Gonzales v. City of Castle Rock, 307 F.3d 1258 (10th Cir. 2002) 5

Jennings v. City of Stillwater, 2004 WL 2044312 (10th Cir. Sept. 14, 2004) 4, 5, 7, 8

Jones v. Union County, 296 F.3d 417 (6th Cir. 2002) 7, 8

Mathews v. Eldridge, 424 U.S. 319 (1976) 9

Pierce v. Delta County Dep't of Social Servs., 119 F. Supp. 2d 1139 (D. Colo. 2000) 8

Semple v. City of Moundsville, 963 F. Supp. 1416 (N.D.W. Va. 1997) 8

Siddle v. City of Cambridge, 761 F. Supp. 503 (S.D. Ohio 1991) 2

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

42 U.S.C. § 1983 1

Fed. R. Civ. P. 12(b)(6) 1

Okla. Stat. tit. 22, § 40.3(A) 5

STATEMENT OF THE CASE

The Respondent, Jessica Gonzales, brought an action under 42 U.S.C. § 1983 in the United States District Court for the District of Colorado against the Petitioner and three of its police officers. Ms. Gonzales' complaint alleged that the due process rights of her and her three (now deceased) daughters under the Fourteenth Amendment to the United States Constitution had been violated by the individual police officers because of their failure and refusal to enforce a restraining order against Ms. Gonzales' estranged husband. The complaint also asserted a claim against the Petitioner based on its failure to train its law enforcement officers properly, and its maintenance of an official custom or policy of failing and refusing to respond properly to restraining order violations.

Ms. Gonzales alleged in her complaint (Pet. App. 124a-130a) that her estranged husband, who had a history of suicidal threats and erratic behavior, abducted her children from the front yard of their home in violation of a permanent restraining order and eventually murdered them. With great specificity, Ms. Gonzales detailed in her complaint how, over a five-hour span, she repeatedly asked the Castle Rock police officers to enforce the restraining order against her estranged husband and return the children to her, and how they failed and refused to do so, despite knowing exactly where Mr. Gonzales and the children were, and despite a state statute requiring them to take certain action to enforce the restraining order.

Before any answer to the complaint was filed, the district court dismissed the complaint on a motion made under Fed. R. Civ. P. 12(b)(6), holding that neither the procedural nor substantive components of the Due Process

Clause provided the basis for a cognizable claim against the Petitioner or any of the individual officers. Pet. App. 113a-123a. A panel of the Tenth Circuit Court of Appeals unanimously affirmed the district court's ruling as to the substantive due process claim, but reversed the district court's determination that Ms. Gonzales failed to state a cognizable claim for the violation of her and her daughters' procedural due process rights. On rehearing *en banc*, the Tenth Circuit Court of Appeals held that Ms. Gonzales was entitled to proceed against the Petitioner on her procedural due process claim, but further held that the individual police officers were entitled to qualified immunity as to that claim. Pet. App. 1a-44a.

ARGUMENT

I. THERE IS NO COMPELLING REASON TO GRANT CERTIORARI.

No conflict exists among the judicial circuits of the United States with respect to the precise issue addressed by the Tenth Circuit: namely, "whether a court-issued domestic restraining order, whose enforcement is mandated by state statute, creates a property interest protected by the due process clause of the Fourteenth Amendment." Pet. App. at 2a. In fact, the Tenth Circuit's decision is the *sole* reported circuit court opinion on the issue. Moreover, the Tenth Circuit's opinion is in full accord with the only two reported district court decisions to have addressed the issue, *Coffman v. Wilson Police Dep't*, 739 F. Supp. 257 (E.D. Pa. 1990) and *Siddle v. City of Cambridge*, 761 F. Supp. 503 (S.D. Ohio 1991).

Petitioner's argument that the Tenth Circuit's opinion "severely undermines the guiding principles of" *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989), Pet. at 13, is misplaced. The procedural due process issue addressed by the Tenth Circuit is distinct from the substantive due process claim addressed by this Court in *DeShaney*. The Tenth Circuit correctly noted:

> However, *DeShaney* limited its constitutional review to whether a substantive due process right to government protection exists in the abstract, and specifically did not decide whether a state might afford its citizens "an 'entitlement' to receive protective services in accordance with the terms of the statute, an entitlement which would enjoy due process protection against state deprivation" under *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

Pet. App. at 9a (quoting *DeShaney*, 489 U.S. at 195, n.2). Accordingly, the Tenth Circuit proceeded to utilize the "familiar rubric of *Roth*" to analyze whether Respondent's court-issued restraining order, coupled with certain state statutory provisions, "creates a *Roth*-type entitlement subject to procedural due process protections." Pet. App. at 12a-13a.

The Tenth Circuit's analysis in this regard merely adopted this Court's long-respected *Roth* doctrine, which has successfully stood the test of time. Certainly, the proper invocation of a long-standing and oft-applied doctrine of this Court in a factually novel context is not a compelling reason to grant certiorari. There is absolutely no decision – state or federal, reported or unreported – that would suggest a different result or lead to any uncertainty in the law being created by the Tenth Circuit's

decision. Under these circumstances, there is no compelling reason for this Court to grant certiorari.

II. NO CIRCUIT CONFLICT EXISTS.

A. Petitioner Mischaracterizes the Issue Actually Decided by the Tenth Circuit.

In alleging a circuit conflict, Petitioner loses sight of the issue actually decided by the Tenth Circuit. The Tenth Circuit's opinion emphasized at length the fact that, in reaching its conclusion that Respondent had a protected interest in enforcement of the order which was cognizable under *Roth*, it was relying on the specific language in the restraining order itself, *coupled with* certain statutory language regarding mandatory enforcement of the order. Pet. App. at 16a-29a. The Tenth Circuit *never* held that the statutory language mandating enforcement of the restraining order in and of itself created any protected property interest. In fact, the Tenth Circuit stated just the opposite:

> In this case, the Colorado statute alone does *not* create the property interest. Rather, the court-issued restraining order, which specifically dictated that its terms must be enforced, *and* the state statute commanding the same, establish the basis for Ms. Gonzales' procedural due process claim.

Pet. App. at 12a, n.5 (emphasis added).

This point recently was emphasized by the Tenth Circuit in *Jennings v. City of Stillwater,* 2004 WL 2044312 (10th Cir. Sept. 14, 2004). In *Jennings,* the plaintiff asserted a violation of her procedural due process rights,

arguing that an Oklahoma statute created a constitutionally-protected property interest in "not being discouraged from prosecuting" a sexual assault claim. *Jennings* at *6. Writing for a unanimous panel, Judge McConnell (who dissented in the case at bar and was joined in *Jennings* by Judge Kelly, who also dissented in the present case) stated:

> Relying on the panel opinion in, *Gonzales v. City of Castle Rock*, 307 F.3d 1258, 1264 (10th Cir. 2002), Plaintiff argues that when regulatory language in a statute "is so mandatory that it creates a right to rely on that language," an entitlement is created that "[cannot] be withdrawn without due process." *Id., quoting Cosco v. Uphoff*, 195 F.3d 1221, 1223 (10th Cir. 1999) (per curiam). Plaintiff argues that Okla. Stat. tit. 22, § 40.3A entitles her not to be discouraged from prosecuting the offenders, and that Detective Buzzard deprived her of this right. Whatever the force of this argument under our *Gonzales* holding as it existed at the time Plaintiff filed her appeal, it is foreclosed by our subsequent en banc opinion, issued just before this case was argued. *See Gonzales v. City of Castle Rock*, 366 F.3d 1093 (10th Cir. 2004) (en banc) [hereinafter *Gonzales II*]. In *Gonzales II* we analyzed due process claims brought against local police officers who failed to enforce a court-issued restraining order. Both the restraining order and the relevant state statute contained language that required police to arrest restrained persons who were in violation of the order. The statute provided: "A peace officer shall arrest, or, if arrest is impractical . . . seek a warrant for the arrest of the restrained

person." *Gonzales II*, 366 F.3d at 1097, 1104. While the original panel opinion left open the possibility that the mandatory statutory language, standing alone, could create an interest enforceable through the due process clause, that position was rejected by the en banc Court. The en banc Court characterized Ms. Gonzales' property interest as the product of a court-issued restraining order, coupled with statutory language requiring enforcement. *See id.* at 1101-05. The Court disclaimed the theory Plaintiff now urges:

> In this context, many of the cases cite[d in the] dissent are inapposite to the specific facts and legal arguments raised in the present case because the courts in those cases rejected the argument that statutes detailing procedures regarding general child abuse investigations and reporting could *alone* create a protected interest in such services. [citing cases] In this case, *the [state] statute alone does not create the property interest.* Rather, the court-issued restraining order, which specifically dictated that its terms must be enforced, and the state statute commanding the same, establish the basis for Ms. Gonzales' procedural due process claim.

Id. at 1101 n.5 (emphasis added).

Similarly, after addressing the state's statutory regime, the Court dropped a footnote stating:

> While we asked the parties to brief whether a protected property interest was created by the mandatory terms and objective predicates laid out in [the state statutes], we do not so hold. Rather, we conclude that the statute's force derives from the existence of a restraining order issued by a court on behalf of a particular person and directed at specific individuals and the police.

Id. at 1104 n.9.

> Here, unlike *Gonzales II,* Plaintiff's asserted property interest rests solely on the language of the Oklahoma statute. There was no court order specifically applying the protections of the statute to her. The procedural due process claim can thus not be maintained.

Jennings, at *7-9. In this regard, the Tenth Circuit's opinion in the present matter must be read as reflecting a very fact-specific issue that is unlikely to recur frequently.

B. The Circuit Conflict Alleged by Petitioner is Illusory.

All of the cases relied upon by Petitioner in support of an alleged circuit conflict are readily distinguishable. None of those cases involved a restraining order violation, let alone the violation of a court order of any kind. Each of those cases addressed arguments that a violation of a state statute *alone* created some kind of protected property interest. *See, e.g., Jones v. Union County,* 296 F.3d 417 (6th Cir. 2002) (alleged failure by sheriff to serve *ex parte* protection order); *Doe by Fein v. District of Columbia,* 93 F.3d 861 (D.C. Cir. 1996) (alleged violation of District of Columbia statute regarding procedures for investigating child abuse and neglect); *Doe by Nelson v. Milwaukee County,* 903 F.2d 499 (7th Cir. 1990) (alleged violation of

Wisconsin statute requiring social services department to investigate a report of child abuse within 24 hours); *Doe v. Hennepin County,* 858 F.2d 1325 (8th Cir. 1988) (alleged violation of Minnesota statute regarding child abuse investigations); *Pierce v. Delta County Dep't of Social Servs.,* 119 F. Supp. 2d 1139 (D. Colo. 2000) (alleged failure to report child abuse allegations, as required by Colorado statute); *Semple v. City of Moundsville,* 963 F. Supp. 1416 (N.D.W. Va. 1997) (alleged failure to advise of certain rights of domestic abuse victim or serve temporary protective order in violation of West Virginia statute).[1] In the present case, the Tenth Circuit examined whether the terms of a court-issued restraining order *and* a statute mandating its enforcement created a property interest. None of the cases cited by Petitioner contain an analogous fact pattern or analysis. Moreover, as noted above, the Tenth Circuit in its recent *Jennings* opinion made clear that its opinion at bar is not to be construed as sanctioning the creation of a property interest out of a statutory mandate alone.

In summary, there is no real circuit conflict nor any real likelihood that one will arise. The alleged conflict urged by Petitioner readily is resolvable on factual grounds, does not involve deciding between differing legal

[1] Most of these cases have arisen in the context of child abuse allegations, which is not the factual context of the case at bar. Furthermore, *Jones* specifically addressed the issue of substantive rather than procedural due process. "While *Jones* rightly rejected the plaintiff's reliance on *Roth* for the proposition that violation of a state statute could give rise to a substantive due process claim, it did not provide any further discussion on whether the state statute at issue had in fact created a protected property interest subject to procedural due process protections." Pet. App. at 10a, n.4 (citing *Jones*, 296 F.3d at 429).

views, and does not have any viable importance for the proper administration of the law. The Tenth Circuit's opinion at bar is in full accord with other cases and does not present any important, troublesome or persistent conflict in the law.

III. THE TENTH CIRCUIT DID NOT DECIDE ANY UNSETTLED IMPORTANT QUESTION OF FEDERAL LAW REGARDING THE KIND OF PROCESS DUE A HOLDER OF A RESTRAINING ORDER IN COLORADO.

In addressing the question of what process was due to Respondent, the Tenth Circuit applied the long-standing balancing test required by *Mathews v. Eldridge,* 424 U.S. 319 (1976). Curiously, Petitioner does not take issue with the applicability of this test or the method by which it was employed by the Tenth Circuit. Rather, Petitioner asks this Court to grant certiorari to "fashion procedures that must be implemented before a state or its employees *fail* to act." Pet. at 25. Presumably, this task would involve the Court revisiting *Mathews* and developing new and specific procedural guidelines for municipalities, but Petitioner does not provide any compelling reason for doing so. In any event, given the limited nature and narrow contents of the Tenth Circuit's ruling, such a broad issue would not be ripe for this Court's review.

Petitioner makes a generalized claim that the Tenth Circuit failed to provide any guidance as to the kind of process due and has imposed upon the district courts the burden of designing procedures. This simply is not the case. The Tenth Circuit applied the *Mathews* analysis to the particular facts of this matter, and expressly held that the Respondent was entitled to the following process:

> The statute directs police officers to determine whether a valid order exists, whether probable cause exists that the restrained party is violating the order, and whether probable cause exists that the restrained party has notice of the order. If, after completing these three basic steps, an officer finds the restraining order does not qualify for mandatory enforcement, the person claiming the right should be notified of the officer's decision and the reason for it.

Pet. App. at 40a (citations and footnotes omitted). The Tenth Circuit provided Petitioner and other municipalities in Colorado with a specific process to follow when presented with an alleged restraining order violation. Petitioner does not contend that either the Tenth Circuit's conclusion or its analysis in this regard was wrong. No compelling reason exists for the Court to grant certiorari as to any issue regarding the kind of process due under the novel fact pattern of the present matter.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BRIAN J. REICHEL
Counsel of Record
LAW OFFICE OF BRIAN J. REICHEL
5023 West 120th Avenue, #326
Broomfield, CO 80020
303-465-9034

Counsel for Respondent

(4)

Supreme Court, U.S.
FILED
OCT 15 2004
OFFICE OF THE CLERK

No. 04-278

IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHERYN GONZALES, AND LESLIE GONZALES,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

THOMAS S. RICE
ERIC M. ZIPORIN
Counsel of Record
Senter Goldfarb & Rice, L.L.C.
P.O. Box 22833
Denver, CO 80222
(303) 320-0509

JOHN C. EASTMAN
c/o Chapman University
School of Law
One University Drive
Orange, CA 92866

ERIK S. JAFFE
Erik S. Jaffe, P.C.
5101 34th Street, NW
Washington D.C. 20008

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. The Circuit Split at Issue Here is Real, Extensive, and Expressly Acknowledged in Several Opinions of the Court Below 2

II. The Issue Presented in this Case Will Arise Often Given that Numerous States Have Statutes Requiring Arrest for Probable Violations of Restraining Orders 5

III. The Decision Below Represents a Sweeping Circumvention of *DeShaney*. 7

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Board of Regents of State Colleges v. *Roth*,
408 U.S. 564 (1972) 3, 5, 7

DeShaney v. *Winnebago County Dep't of Soc. Srvs.*,
489 U.S. 189 (1989) 1, 3, 7, 8

Doe by Fein v. *District of Columbia*,
93 F.3d 861 (CADC 1996) 3, 4

Doe by Nelson v. *Milwaukee County*,
903 F.2d 499 (CA7 1990) 3, 4

Doe v. *Hennepin County*,
858 F.2d 1325 (CA8 1988) 3, 4

Jennings v. *City of Stillwater*,
2004 WL 2044312 (CA10, Sept. 14, 2004) 4

Jones v. *Union County, Tennessee*,
296 F.3d 417 (CA6 2002) 2, 3, 4

Statutes

Colo. Rev. Stat. § 19-3-316(1)(d) 6

Mass. Gen. Laws ch. 209A, § 7 6

Minn. Laws § 518B.01(e) 6

N.J. Stat. Ann. § 9:6-8.18 6

No. 04-278

IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHERYN GONZALES, AND LESLIE GONZALES,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

Respondent's contention that certiorari is not warranted in this case misconstrues the holdings of the several circuit court decisions in conflict with the *en banc* decision of the Tenth Circuit below, ignores the explicit recognition of that conflict contained in several of the opinions below (both the majority opinion and those of the dissenting judges), and severely downplays the scope of the Tenth Circuit's holding and its incompatibility with this Court's decision in *DeShaney* v. *Winnebago County Department of Social Services*, 489 U.S. 189 (1989). Properly considered, both the extent of

the circuit split and the scope of the Tenth Circuit's holding strongly support review by this Court.

I. The Circuit Split at Issue Here Is Real, Extensive, and Expressly Acknowledged in Several Opinions of the Court Below.

In contending that "no circuit conflict exists" and that the "circuit conflict alleged by Petitioner is illusory," Respondent not only misconstrues the holdings of the conflicting circuits but also overlooks the express acknowledgement of those conflicting decisions in several of the opinions issued by the Tenth Circuit below.

Respondent's sole distinction of the conflicting cases is the unfounded claim that other courts only "addressed arguments that a violation of a state statute *alone* created some kind of protected property interest," whereas the case below involved a "restraining order," "*coupled with* certain statutory language regarding mandatory enforcement of the order." Br. in Opp. at 4, 7 (emphases in original). The crux of Respondent's distinction seems to be that under the decision below a property interest only arises when a general statute is made specifically applicable to a particular individual through some additional step such as a restraining order whose mandatory enforcement is triggered by a *report* of its violation. That distinction, however, does nothing to resolve the conflict.

The conflicting decision of the Sixth Circuit in *Jones* v. *Union County, Tennessee*, 296 F.3d 417, 420 (CA6 2002), clearly involved *both* a restraining order and mandatory language in a state statute. Indeed, the complaint in that case specifically alleged a due process violation from Defendants' "failing to protect Plaintiff from her ex-husband after affirmatively undertaking a duty to do so following the issu-

ance of the *ex parte* order of protection"—the identical claim alleged below.[1]

Similarly, the decisions of the Seventh, Eighth, and D.C. Circuits in *Doe by Nelson* v. *Milwaukee County*, 903 F.2d 499 (CA7 1990), *Doe* v. *Hennepin County*, 858 F.2d 1325 (CA8 1988), and *Doe by Fein* v. *District of Columbia*, 93 F.3d 861 (CADC 1996), respectively, all involved mandatory enforcement language in a statute *coupled with* an individualized report making that mandatory enforcement language specifically applicable to the *particular* individual claiming protection under the statutory scheme. The statutory mandates at issue in all three cases became applicable only after a report of child abuse referencing a particular child was filed, just as the Colorado statutory mandate at issue here became applicable only after a report of some particular conduct prohibited by the protective order. The Seventh Circuit, however, squarely rejected plaintiff's attempt to "circumvent" *DeShaney* by attempting "to assert a violation of their *procedural* due process rights." *Doe by Nelson*, 903 F.2d, at 502. The D.C. Circuit rejected the procedural due process claim as "severely flawed." *Doe by Fein*, 93 F.3d, at 868. And the Eighth Circuit likewise rejected the *Roth*-type claims. 858 F.2d, at 1328. If there is a distinction between those three cases, on the one hand, and the case below, on the other, it is surely a "distinction without a difference," as Judge Kelly noted in his dissenting opinion. Pet. App. 45a.

The Circuit split also was acknowledged in several of the opinions below—expressly in two of the dissenting opinions

---

[1] Respondent's further contention, in footnote 2, that "*Jones* specifically addressed the issue of substantive rather than procedural due process" is likewise erroneous. *Jones* specifically rejected plaintiffs' *Roth*-type claim as "misplaced." 296 F.3d, at 429. *Roth*, of course, is the decision of this Court articulating the *procedural* due process claim asserted by Ms. Gonzales below, *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972), not the *substantive* due process claims rejected in *DeShaney*.

and implicitly in the majority opinion. Judge O'Brien noted that the Tenth Circuit was "dramatically separated from other circuits" as a result of the ruling below, including the Sixth, Seventh, and D.C. Circuits. Pet. App. 67a. Judge Kelly found the interest supposedly created by the restraining order to be "too general" to qualify as a protectable liberty interest; the restraining order did not mandate a "certain outcome in which to have a legitimate expectation of entitlement," as required by the Eighth Circuit. Pet. App. 51a (citing *Doe* v. *Hennepin County*, 858 F.2d, at 1328).

Even Judge Seymour, writing for the *en banc* majority, recognized that decisions from the Sixth, Seventh, and D.C. Circuits rejected claims of entitlement to government protection against private violence, in contrast to the Tenth Circuit's recognition of such claims in the opinion below. *See* Pet. App. at 10a n.4 (citing, e.g., *Jones*, 296 F.3d, at 429; *Doe by Fein*, 93 F.3d, at 868-69; and *Doe by Nelson*, 903 F.2d, at 502-03. The grounds upon which Judge Seymour sought to distinguish these cases are simply not sustainable.[2] Judge Seymour held below that the force of mandatory language in a state statute "derives from the existence of a restraining order issued by a court *on behalf of a particular person* . . . ." Pet. App. 18a n.9 (emphasis added). But the broad, undifferentiated mandate of a state statute becomes focused on particular individuals (and hence gives rise to a protectable property interest under the Tenth Circuit's holding) as much by the filing of a specific child abuse report with an executive branch official as by the reporting that a

[2] The Tenth Circuit's subsequent decision in *Jennings* v. *City of Stillwater*, 2004 WL 2044312 (CA10, Sept. 14, 2004), referenced by Respondent, does not make Judge Seymour's attempt to distinguish the conflicting circuit decisions any more viable. Unlike the child abuse reports that were filed in *Doe by Fein*, *Doe by Nelson*, and *Jones*, or the restraining order issued in the present case, there was nothing formally filed in *Jennings* that would focus the generic statutory mandate on a particular individual.

specific restraining order issued by a judicial official has been violated. Indeed, if the Tenth Circuit decision is read to support the proposition that a protectable, *Roth*-type property interest arises *only* when a judicial order is coupled with mandatory language in a state statute, then it would seem that *only* the courts are capable of creating *Roth*-type interests—certainly not a result envisioned by this Court in *Roth* itself.

The Tenth Circuit's misplaced attempt to distinguish the conflicting decisions of its sister courts is therefore no reason to forestall this Court's review, but the attempt does serve to demonstrate that the contrary decisions from the Sixth, Seventh, Eighth, and D.C. Circuits were given full consideration by the *en banc* Tenth Circuit court. There is thus no reason for this Court to await further percolation of the issues presented by this petition

II. The Issue Presented in this Case Will Arise Often Given that Numerous States Have Statutes Requiring Arrest for Probable Violations of Restraining Orders.

Respondent's claim that this case is a unique and fact-bound application of *Roth* is no more accurate than its denial of a split. Even assuming, *arguendo*, respondent's narrow construction of the holding below as limited to situations where a restraining order combines with a statute to create a "property" interest, such situations will arise under numerous statutory schemes throughout the country. As *amici* have noted, 19 states in addition to Colorado require an arrest where there is probable cause to believe that a protective order has been violated. Brief of *Amici Curiae* International Municipal Lawyers Association and National League of Cities ("IMLA Br."), at 5 (citing statutes).

Petitioner provided in its petition a long list of statutes that would create municipal liability, *see* Pet. at 15 n.13, and *amicus curiae* Denver Police Protective Association has pro-

vided several more. We repeat just a few here to reiterate the point. In Massachusetts, "Law enforcement officers *shall* use every reasonable means to enforce . . . abuse prevention orders." Mass. Gen. Laws ch. 209A, § 7. As with the Colorado statutory scheme at issue here, the Massachusetts statute contains mandatory language and is coupled with a particular prevention order. In Minnesota, "A peace officer *shall* arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated [a domestic abuse protection] order." Minn. Laws § 518B.01(e). Again, mandatory language is coupled with a protection order. The same is true in New Jersey, where "The Bureau of Children's Services . . . *shall* upon receipt of [a] report [of suspicious injury to a child], take action to insure the safety of the child." N.J. Stat. Ann. § 9:6-8.18.

The Tenth Circuit's holding will also apply to other statutory provisions in Colorado itself. For example, section 19-3-316(1)(d) of the Colorado Revised Statutes provides: "At any time that [a] law enforcement agency . . . has reason to believe that a violation of [a child protection order] has occurred, it *shall* enforce the order." (Emphasis added). The child protection order, coupled with the mandatory language in the statute, will give rise to constitutional claims of municipal liability for every failure to protect against private violence. Not only will municipal governments be besieged with such claims, but they will effectively become insurers against third party violence should the Tenth Circuit's holding be allowed to stand.

Restraining orders are issued routinely in Colorado and throughout the country in a wide variety of cases. As *amici* have noted, such orders are issued in ordinary criminal cases in addition to domestic violence or custody cases. IMLA Br.. at 4-5. A simple Westlaw search reveals over 4,000

cases discussing violations of restraining orders.[3] And the number of cases that actually made it into Westlaw surely underestimates the number of restraining orders issued, and even the number of violations of such orders, by a substantial amount. In short, there is nothing unique or fact-bound about the circumstances that gave rise to this case, and the Tenth Circuit's rule thus has the potential to spawn thousands of due process claims if left unchecked. The substantial and extremely disruptive potential impact of this case thus warrants this Court's review.

III. The Decision Below Represents a Sweeping Circumvention of *DeShaney*.

Respondent erroneously argues that there is nothing inconsistent between this case and *DeShaney*, and hence the Court should not be concerned. But recasting a *DeShaney* claim as a *Roth* claim is nothing more than sleight of hand. Indeed, as Judge McConnell noted in dissent, the problem here was not that Ms. Gonzalez failed to receive a hearing – she was able to speak to the police and state her case – but rather that the hearing did not produce the result desired. See Pet. App. at 63a (McConnell, J., dissenting) ("She cannot say she was not given a chance to be heard. She called several times and explained the situation to the police, and she met with the police in person both at her home and at the police station. The problem is not that she was denied a hearing, but that the officers failed to do their duty. The problem was with the result."). While the failure to perform a state-law duty may or may not give rise to a state-law claim, if that is all it takes to also state a constitutional claim, and the supposed procedures required are actually a requirement to satisfy the *substantive* duty, then the difference be-

---

[3] Search conducted on October 14, 2004 of all federal and state cases using the search phrase violat! /10 restraining /2 order, which yielded 4214 cases.

tween substantive and procedural due process becomes meaningless. *Id.* at 65a ("If the majority is correct, it will always be possible for plaintiffs to re-characterize their substantive due process claims against arbitrary action by executive officials as 'procedural due process' claims, thus avoiding the Supreme Court's exacting 'shocks the conscience' test and getting, instead, the balancing test of *Mathews*. It will always be possible to say that, before they took the complained-of action, the executive officials should have engaged in some additional deliberative process, which might have averted the problem."); *id.* at 66a-67a ("The effect of allowing claims that are essentially substantive to masquerade as procedural is to collapse the distinction between the two components of due process and to expand greatly the liability of state and local governments.").

Even if limited to cases where protective orders are involved, the Tenth Circuit's approach substantially undermines *DeShaney* and shifts constitutional responsibility for private violence onto government shoulders. And, as is more likely, if the reasoning of the Tenth Circuit decision is followed in all cases where a statutory obligation is made specific to an individual in numerous other ways beyond protective orders, then *DeShaney* will become virtually a dead letter. Surely *DeShaney* meant something, and the Tenth Circuit's decision to render it all but nugatory warrants this Court's review.

CONCLUSION

In the end, the fundamental flaw of the decision below remains unanswered: It has constitutionalized state-law procedures for the enforcement of restraining orders by converting such procedures into "property" interests that must themselves be subject to still further procedures as dictated by a federal court. Pretending that such an infinite regression is not a circumvention of the basic principle of *DeShaney* does

not make it so. For the reasons stated above and previously, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

THOMAS S. RICE
ERIC M. ZIPORIN
Counsel of Record
Senter Goldfarb & Rice, L.L.C.
P.O. Box 22833
Denver, CO 80222
(303) 320-0509

JOHN C. EASTMAN
c/o Chapman University
School of Law
One University Drive
Orange, CA 92866

ERIK S. JAFFE
Erik S. Jaffe, P.C.
5101 34th Street, NW
Washington D.C. 20008

Counsel for Petitioners

Dated: October 15, 2004.

3

Supreme Court, U.S.
FILED
SEP 29 2004
OFFICE OF THE CLERK

No. 04-278

IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHERYN GONZALES, AND LESLIE GONZALES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

BRIEF OF *AMICUS CURIAE* THE DENVER POLICE PROTECTIVE ASSOCIATION IN SUPPORT OF PETITIONER

David J. Bruno
Counsel of Record
Jeffrey J. Clayton
Bruno, Bruno, & Colin, P.C.
1560 Broadway, Suite 1099
Denver, CO 80220
(303) 831-1099

Counsel for Amicus Curiae The Denver Police Protective Association

QUESTIONS PRESENTED

1. Whether, in conflict with decision of the Sixth, Seventh, Eighth, and D.C. Circuits, the Tenth Circuit's decision permitting a *procedural* due process claim against a local government for its failure to protect the holder of a partial restraining order from private violence, so circumvents as to effectively repudiate this Court's holding in *DeShaney* rejecting a similar *substantive* due process claim?

2. If the Fourteenth Amendment's Due Process Clause is read to permit, via its procedural aspects, the same substantive claims already rejected by this Court in *DeShaney*, what kind of process is required for police inaction with respect to a partial restraining order *not* to violate the constitution?

PARTIES TO THE PROCEEDING

Petitioner: Town of Castle Rock, Colorado, a Colorado home rule municipal corporation.

Respondent: Jessica Gonzales, individually and as next friend of her deceased minor children Rebecca Gonzales, Katheryn Gonzales, and Leslie Gonzales.

Other Defendants Below: Aaron Ahlfinger, Robert S. Brink, and Marc Ruisi, current or former members of the Town of Castle Rock Police Department.

Amici Curiae Below: Colorado Municipal League; Colorado Counties, Inc.; and Colorado Association of Chiefs of Police.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
INTEREST OF *AMICUS CURIAE* 1
REASONS FOR GRANTING THE WRIT 3
I. The *En Banc* Opinion of the Court of Appeals Will Result in a Substantial Increase in Litigation Against Police Officers and Will Cause Officer Confusion on the Streets as to When to Take A Police Action. 3
A. The Court's Decision Eliminated Qualified Immunity for Officers Who Face the Mandatory Command of C.R.S. § 18-6-803.5 and Other Similar Mandatory Statutes, Which Will Result in More Litigation Against Police Officers. 3
B. Numerous State and Local Laws Presently in Existence Would Confer a Property Right to Mandatory Police Actions or Enforcement Under the Court of Appeals' Analysis 5
II. The Court of Appeals Decision Will Create an Incentive for State and Local Governments to Remove Statutory and Regulatory Commands that Confer a Property Right, and Such Revisions Will Destroy the System of Officer Discipline and Create Chaos on the Streets 15
CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Board of Regents v. Roth, 408 U.S. 564, 577 (1972) 16

Gonzales v. City of Castle Rock, 366 F.3d 1093, 1117-18 (10th Cir. 2004) (*en banc*) ..... passim

Pierce v. Delta County Department of Social Services, 119 F.Supp.2d 1139, 1149 (D.Colo. 2000) 11, 12

STATUTES

C.R.S. § 13-6-107 15

C.R.S. § 14-10-107 15

C.R.S. § 14-10-108 15

C.R.S. § 14-4-101 15

C.R.S. § 14-4-103 15

C.R.S. § 18-1-1001 15

C.R.S. § 18-6-800.3 14

C.R.S. § 19-2-403 15

C.R.S. § 19-3-302 10

C.R.S. § 19-3-309 10

C.R.S. § 19-4-111 15

Denver City Charter § 42-18 13

Denver City Charter § 42-19 13

Denver City Charter § 42-20 13

Denver City Charter §§ 42-27, 28 & 29 13

RULES

Colorado Rule of Civil Procedure 365 15

REGULATIONS

Denver Police Department Operations Manual 14

Denver Police Department Operations Manual § 104.50 ..... 14, 15

No. 04-278

IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHERYN GONZALES, AND LESLIE GONZALES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

BRIEF OF *AMICUS CURIAE* THE DENVER POLICE PROTECTIVE ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The Denver Police Protective Association ("DPPA") is an association representing police officers who are employed by the City and County of Denver, Colorado. The purpose of the DPPA is to improve wages, hours, terms and conditions of employment of Denver officers, aid in the

[1] The Denver Police Protective Association files this brief with the consent of all parties. The letters granting consent have been previously filed or are being filed concurrently. No counsel for a party authored this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

improvement of the laws that govern the conduct and discipline of police officers, encourage police professionalism, and protect member-officers from injustice. In accord with those purposes, the DPPA offers its *amicus curiae* brief in support of the subject Petition for Writ of Certiorari upon the following bases.

In the instant action, the Tenth Circuit Court of Appeals extinguished qualified immunity for police officers as the result of their failure to offer a constitutionally sufficient procedure pursuant to C.R.S. § 18-6-803.5, when officers do not properly "hear" that spoken by a party who possesses a protective order, *Gonzales v. Town of Castle Rock*, 366 F.3d 1093, 1117 (10th Cir. 2004) (*en banc*). Previously such an action would have been prohibited by *DeShaney*. As the result, the DPPA predicts police officers will be unsure as to when to take a police action. Further, the DPPA believes that the judgment of the Court of Appeals will lead to an outbreak of litigation in the Tenth Circuit asserting claims of procedural due process based on other laws which mandate police enforcement.

Additionally, the judgment of the Tenth Circuit Court of Appeals will create great confusion for officers in the performance of their duties, and leave them little guidance in terms of deciding when a procedural due process right arises and what process is then due under the circumstances. Further, due to the inevitable shortage of resources and the status of officers as "first responders" in the war on terror, circumstances likely will arise in which the officer's response to procedural requirements will cause their attention to be diverted from other matters with potentially grave consequences. The Court of Appeals leaves officers no guidance on what to do in such situations and certainly suggests that they will face liability if they fail to offer the requisite process for any reason. The Court of Appeals' decision further will put officers in daily dilemmas as to what they ought to do in the case of when only one officer is

available to offer the necessary procedural due process to multiple persons to whom it is due.

In addition, the Tenth Circuit Court of Appeals' judgment creates an incentive for state and local governments to eliminate laws which may confer a property right so as to extinguish the potential that a litigant could prevail in arguing that no meaningful pre-deprivation hearing was held. Specifically, the City and County of Denver would have an incentive to re-write portions of the City Charter and Denver Police Department Operations Manual because each contain mandatory commands to officers that, under the analytical framework of the Court of Appeals' decision, would confer a property right to police protection or action. Such a result would have the collateral effect of destroying the written regulatory system that defines officer duties and conduct, and would lead to inconsistencies in enforcement and confusion due to poorly defined duties.

In short, if the Court declines to hear this case, officers will have difficulty on the streets deciding when to act and when not to act in order to avoid the possibility of liability. The DPPA is concerned that, to avoid litigation and liability over property rights, the City and State of Colorado will simply eliminate those laws which may create a procedural due process claim. The collateral effect would be to eliminate the specific duties of officers, creating even more confusion as to when an officer should take a police action and causing inconsistent enforcement of the law.

REASONS FOR GRANTING THE WRIT

I. The *En Banc* Opinion of the Court of Appeals Will Result in a Substantial Increase in Litigation Against Police Officers and Will Cause Officer Confusion on the Streets as to When to Take A Police Action.

A. The Court's Decision Eliminated Qualified Immunity for Officers Who Face the Mandatory

Command of C.R.S. § 18-6-803.5 and Other Similar Mandatory Statutes, Which Will Result in More Litigation Against Police Officers.

The Tenth Circuit affirmed the District Court's grant of dismissal of the case against Officers Ahlfinger, Brink, and Ruisi based on the affirmative defense of qualified immunity. *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1117-18 (10th Cir. 2004) (*en banc*). The Court did so because it found insufficient precedent to conclude that the law was then clearly established, noting that only two district courts have "held that protective orders or their supporting statutes created a property interest in enforcement." *Id.* Certainly, the Court of Appeals' decision will result in future courts concluding that the procedural rights contained in C.R.S. § 18-6-803.5 and others are now clearly established, thus permitting future plaintiffs to assert these procedural due process claims against officers who fail to offer a process that leads to enforcement. Judge O'Brien in his dissent wrote:

> Qualified immunity has now been substantially eroded, if not eliminated, in all cases based upon mandatory and directive language contained in a statute. The law enforcement community is now on notice--"shall" means "shall"—and we shall brook no nonsense. Almost any such case, cleverly pled, will survive a motion to dismiss and quite possibly a motion for summary judgment. With the loss of immunity from liability goes the loss of immunity from suit. The rippling effects of what we have done here are obscured by the narrow focus—the need for a global approach to the issue of legislative purpose is evident.

Gonzales, 366 F.3d at 1138 (O'Brien, J., dissenting).

Thus, since officers are no longer immune from suit, potential plaintiffs now have an incentive to bring suit

against officers whenever damage arises from an officer's failure to take action in these instances. Plaintiffs will argue that proper procedure would have prevented the substantive injury. *Gonzales*, 366 F.3d at 1117 ("…the use of additional safeguards would have certainly aided in preventing the risk of wrongful deprivation."). As Judge McConnell noted in dissent, "[i]f the majority is correct, it will always be possible for plaintiffs to recharacterize their substantive due process claims against arbitrary action by executive officials as 'procedural due process' claims … . It will always be possible to say that, before they took the complained-of action, the executive officials should have engaged in some additional deliberative process, which might have averted the problem." *Gonzales*, 366 F.3d at 1129-30 (McConnell, J., dissenting). This cost to officers is but one of the "[e]normous economic consequences" that will flow from the majority's "reading of the fourteenth amendment." *Gonzales*, 366 F.3d at 1119, n.2 (Kelly, J., dissenting).

B. **Numerous State and Local Laws Presently in Existence Would Confer a Property Right to Mandatory Police Actions or Enforcement Under the Court of Appeals' Analysis**

The Court of Appeals decision "invites litigation in even more dubious cases" than the one at issue. *Gonzales*, 366 F.3d at 1093 (McConnell, J., dissenting). As Judge O'Brien noted in dissent, "[t]his decision will encourage others to scour state statutes and regulations in search of mandatory language on which to base their entitlements." *Gonzales*, 366 F.3d at 1141 (O'Brien, J., dissenting). Individual officers and their employers of course will be defendants in such litigation.

The framework the Court of Appeals used to determine a property right is amazingly simple given the volume of pages necessary to describe it. The Court of Appeals held that "the restraining order's *specific terms*, *mandatory language*, and

objective predicates limiting decision maker discretion, created a protected property interest in the enforcement of the domestic abuse protective order granted to Ms. Gonzales." *Gonzales*, 366 F.3d at 1116 (emphasis added). As to the *specific terms* of a statute or court order, the Court held that when a provision "mandates" a certain result and provides criteria which are by definition "objective predicates," *Id.* at 1104-05, a property right exists. The Court later states that, "[t]he word 'shall' is mandatory, not precatory, and its use in a simple declarative sentence brooks no contrary interpretation." *Id.* at 1109 (citation omitted). In dissent, Judge O'Brien reads the test simply as "'objective predicates,' which 'mandate the outcome' and 'limit discretion.'" *Id.* at 1137 (O'Brien, J., dissenting). The only guidance from the Court of Appeals on what constitutes an "objective predicate" is that the analysis turns on those duties which could be "reviewed under objectively ascertainable standards and judged by what a reasonably trained officer would know." *Id.* at 1105. This standard could be used to review most, if not all, of the statutory and regulatory commands describing the duties of police officers, and may potentially create "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Parratt v. Taylor*, 451 U.S. 527, 537 (1981) (citation omitted), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986).

The Court of Appeals held that the legislative history of C.R.S. § 18-6-803.5 indicated a specific intent to create a constitutionally-protected property right. The broad standard used by the Court, however, would result in a similar finding by courts in nearly every statutory and regulatory command governing police action that meets the test of specific language and objective predicates. The Court restated, with emphasis, the following language in the legislative history of C.R.S. § 18-6-803.5 as indicative of the clear legislative intent to create a property right: "*... the entire criminal*

justice system must act in a consistent manner, which does not now occur. ... the entire system must send the same message and enforce the same moral values ..." *Gonzales*, 366 F.3d at 1107 (emphasis supplied). The Court held that this language "emphasized the importance of the police's mandatory enforcement." *Id.* There was no mention of the word "property" nor were there any comments placed in the legislative record suggesting that this legislation took the extraordinary step of creating a constitutionally protected property right. One would suspicion that when a legislative body creates a property interest that previously did not exist, there would be some mention or consideration of the impact of conferring such a property right. There was not any mention of any of these concepts by the General Assembly in this instance. Likely instead the legislature relied on *DeShaney*.

This broad read of legislative purpose as a clear intent to confer a specific procedural right would permit findings that nearly all other statutes that provide officers a specific, non-discretionary order in particular circumstances confer a property right to an adequate pre-termination hearing. Frankly, the existence of all rules of conduct governing police officers are enacted for the benefit of members of a community so as to deliver consistency in enforcement of the laws, govern the conduct of police officers in specific situations, hold perpetrators of crime "accountable," and make victims or potential victims of crime "feel safe." *Gonzales*, 366 F.3d at 1107. A person protected by a regulatory or statutory command mandating officer action and containing the requisite objective predicate could prevail under procedural due process because all specific officer duties were created for the precise reasons the Court believed distinguished C.R.S. § 18-6-803.5 in this case. The Court of Appeals' decision will in effect permit a procedural due process claim to go forward when the officer "hears" a victim's complaint suggesting that an officer take a

mandatory police action but the officer fails to really "listen" to the substance of what the victim said. *Gonzales*, 366 F.3d at 1117 ("If one considers that constitutional process includes a right to be heard, Ms. Gonzales was deprived that process because, according to her allegations, the police never 'heard' nor seriously entertained her request to enforce and protect her interests in the restraining order.")

The end result of the Court's decision will be to confuse officers on the street as to when to act or when other duties or property rights in police protection can excuse inaction. Judge Kelly noted this problem in dissent by stating that the majority opinion "necessarily means that enforcement of this misdemeanor offense or this particular protective order prevails over any other law enforcement priorities and regardless of the circumstances." *Gonzales*, 366 F.3d at 1125 (Kelly, J., dissenting). Judge Kelly further suggested that the effect of the majority interpretation is to hold the property right of Ms. Gonzales "to the exclusion of protecting the public, other law enforcement priorities, and peace officers themselves." *Id.*

The Court further imposes the obligation on individual officers of giving a constitutionally adequate reason for the failure to take action. How officers are required to go about this is not defined with any particularity by the Court of Appeals. The Court only says that officers must make sure that they "engaged in bona fide consideration" and that the process offered is not a "sham" that renders a property interest a nullity. *Id.* at 1117. As Judge Kelly noted in dissent, it would be utterly impracticable to require law enforcement officers to conduct pre-deprivation hearings in the course of their other duties. *Gonzales*, 366 F.3d at 1126 (Kelly, J., dissenting).

There are numerous specific statutory and regulatory provisions that, when applying the Court of Appeals' "syllogism," can be asserted as creating a property right.

Gonzales, 366 F.3d at 1137 (O'Brien, J., dissenting). Each and every one of these noted provisions will be the subject of litigation under the Court of Appeals' holding in the District of Colorado, causing a burdensome increase in litigation expenses to officers and the potential of both personal and municipal liability.

1. State Statutory Law

By way of example, the following three sections of the Colorado Revised Statutes will, under the Court of Appeals' analysis, confer a property right to police protection. Certainly, these examples are not by any means an exclusive list of the potential statutory sections that may result in liability. The DPPA is particularly concerned, however, that the property rights conferred by virtue of the following three sections will result in litigation in every case where a property right is infringed because the officers fail to really listen to a witness, perfectly evaluate the situation, and take action based thereon.

C.R.S. § 19-3-316 concerns protection orders and emergency protection orders involving juveniles who are the victims of abuse. The mandatory language in the Statute is nearly identical to that contained in Section 18-6-803.5. In particular, Section 19-3-316(1)(d) states: "At any time that the law enforcement agency having jurisdiction to enforce an order issued pursuant to paragraph (a) of this subsection (1) has cause to believe that a violation of the order has occurred, it shall enforce the order." The General Assembly also provided that "The duties of peace officers enforcing orders issued pursuant to this section shall be in accordance with section 18-6-803.5, C.R.S., and any rules adopted by the Colorado supreme court ... ." C.R.S. § 19-3-316(3). Thus, this section contains the same enforcement provision and confers the same duties on officers as Section 18-6-803.5.

Legislative history supports the interpretation that C.R.S.

§ 19-3-316 confers a property right under the Court of Appeals analytical framework. First, there is an "emphasis" of the "importance of the police's mandatory enforcement." *Gonzales*, 366 F.3d at 1107. This emphasis is contained in C.R.S. § 19-3-302, which is the "legislative declaration" in enacting the Child Abuse and Neglect code: " ... it is the intent of the general assembly to protect the best interests of children of this state and to offer protective services *in order to prevent any further harm to a child suffering from abuse*" (emphasis added). The legislature here must have "clearly wanted" to protect children from harm. *Gonzales*, 366 F.3d at 1107. "Most significantly," according to the Court of Appeals in analyzing C.R.S. § 18-6-803.5, is the fact that the General Assembly limited the liability of officers, which supported the "goal" of the statutory scheme and the "conclusion" of the Court of Appeals. *Id.* Similarly, C.R.S. § 19-3-309 provides *complete immunity* from liability or adverse job consequences when any person is "performing his duties or acting pursuant to this part 3," and such conduct is not "willful, wanton, and malicious." Thus, the goal of vigilant enforcement supports the conclusion that the General Assembly intended to confer a property right. Finally, this Statute contains the precise objective predicates as C.R.S. § 18-6-803.5. Specifically, when an officer has "cause to believe that a violation of the order has occurred," the officer must "enforce the order." C.R.S. §§ 19-3-316(1)(d) & (2)(s).

A similar property right to police protection could be read into C.R.S. § 19-3-304, which requires peace officers to report child abuse. A peace officer, "who has reasonable cause to know or suspect that a child has been subjected to abuse or neglect" must report the same to law enforcement where the child resides. C.R.S. § 19-3-304(1). The same legislative history underlies this section as Section 19-3-316 above. This Statute contains an objective predicate: "reasonable cause to know or suspect child abuse." *Id.* The

language of the Statute is mandatory: "must report the same." *Id.* Thus, there is a property right in having abuse reported. If such abuse is not reported, an officer may be liable under the Court of Appeals' analysis for the consequences that flow from failing to provide a process that would have led to the filing of the report. In addition, the Court should note that this statutory section contains twenty-nine specific categories of other persons who are mandated to report when the objective predicates are met, widening the field of potential defendants beyond police officers to include nearly every state employee who may come in contact with a minor child. C.R.S. §§ 19-3-304(2)(a) – (cc).

A District of Colorado decision analyzing this section provides a fact pattern that would create a procedural due process claim under the Court of Appeals' analysis. Judge Nottingham of the District of Colorado properly, pursuant to *DeShaney*, rejected the claim that Section 19-3-304 conferred a substantive due process right. *Pierce v. Delta County Department of Social Services*, 119 F.Supp.2d 1139, 1149 (D.Colo. 2000). Under the facts of that case, the police investigators incorrectly "concluded that the allegations of child abuse were unfounded." *Id.* at 1143. The "crux" of Plaintiffs' claim was "that defendants' failure to comply with the [reporting] provisions of the Child Protection Act subjected the Pierce children to ongoing abuse at the hands of Gerard and/or Duran which culminated in Kayanna [Pierce]'s death." *Id.* at 1148. Under the facts of that case, Plaintiffs could now prevail under a claim premised on the Court of Appeals' holding in this case, arguing that the procedures offered by Delta County were in fact a "sham" because the County never properly engaged in "bona fide consideration" of the case at hand. *Gonzales*, 366 F.3d at 1117. It could be similarly be said that the officers and the County in fact never "heard" the complaints of child abuse made during the course of several police fact-finding investigations, which circumstances would have, after the

full facts of the case came out, objectively required enforcement action. *Id.* Judge Nottingham noted that the facts of the case were "tragic." *Pierce*, 199 F.Supp. at 1142. Thus, the equities were such that, if a cause of action could be maintained under procedural due process because the process offered was a sham, there was no bona fide consideration, and the officers failed to "hear" the victim, the process employed in that case could be said to similarly have "rendered her property interest ... not only a nullity, but a cruel deception." *Gonzales*, 366 F.3d at 1117.

Lastly, C.R.S. § 25-1-310 would confer a property right to police protection from oneself when drunk or from another drunken or intoxicated person. This section provides that an intoxicated person who the officer has "probable cause" to believe is intoxicated by alcohol and a danger to the health and safety of himself or others, "shall be taken into protective custody." C.R.S. § 25-1-310(1). The mandatory language is clear and similar to C.R.S. § 18-6-803.5. The standard is probable cause, which according to the Court of Appeals is an objective predicate. The legislative history makes clear that the General Assembly intended to remove the stigma of criminality attached to alcoholism and drug abuse, and thereby encourage officers to place intoxicated persons into protective custody rather than arrest them. C.R.S. § 25-1-301.

In short, the above sections of the Colorado Revised Statutes can be construed as conferring a property right under the Court of Appeals' framework, and thus will form the rule of law under which future claims likely will be brought against officers and others.

2. Municipal Charter and Regulation

Property rights could similarly be based on the Denver Municipal Charter and regulatory directives made pursuant thereto. The City Charter defines specifically how Denver Officers are required to devote their time to the discharge of

their duties to preserve order and to enforce the law throughout the City. Denver City Charter § 42-18.[2] Specifically, officers "*shall* arrest any person found under circumstances which would warrant a reasonable person in believing that such person had committed a crime." Denver City Charter § 42-19(a) (emphasis added). In addition, it is the duty of officers to apprehend any person charged with the commission of a crime. Denver City Charter § 42-20. Officers who do not follow these mandatory commands are subject to discipline up to and including termination. Denver City Charter §§ 42-27, 28 & 29. Each is similar in predicate and command to the instant case. Each contains the objective predicate of probable cause, and each commands police action ("shall arrest"). These provisions thus suggest that when an officer finds probable cause, he has no discretion in deciding whether to arrest. If the officer fails to arrest, and the suspect then commits additional crimes, officers could then be held liable for not providing an adequate process in the first instance.

In addition, Denver officers are by Charter subject to the rules and regulations as prescribed by the Chief of Police and Manager of the Department of Safety, *Id.* § 42-29, which rules are codified as the Denver Police Department Operations Manual (hereinafter "Manual").[3] The Manual contains numerous duties which could be understood under the Court of Appeals' framework to confer a property right to police protection. Certainly, the legislative history of the Manual would support that the purpose in enacting the regulations was to protect each and every member of the community from criminals, who when they are identified, must be brought into custody to prevent them from

---

[2] A current version of the Denver Municipal Charter and Code is located at: http://www.denvergov.org/jump_municode.asp.

[3] The Denver Police Department Operations Manual is located at: http://www.denvergov.org/Police/template311677.asp.

committing further criminal acts against members of the community. The language in the introduction of the manual supports such a mandatory interpretation. *Manual* at ii ("Rules and Regulations must be adhered to at all times;" the Operations Manual "shall be the standard by which the actions of all officers in the Department of Police are to be measured").

Specific sections of municipal regulations that may confer protected property rights under the Court of Appeals' analysis are as follows:

a. Police Enforcement of Domestic Violence Laws.

Manual § 104.50 provides for a mandatory arrest when any act of "Domestic Violence," as defined by C.R.S. § 18-6-800.3 is committed. In addition, this section requires a mandatory arrest when there is probable cause to believe that violations of sections 18-9-111 ("stalking") and 18-6.5-102 ("primary caregivers" perpetrate the violence) have or are occurring. *Manual* § 104.50(2)(c). The objective predicate that must be met is merely that officers believe that there is probable cause that an illegal act of domestic violence has been or is being committed. *Manual* §§ 104.50(4) and (5). The legislative intent to require an arrest is clear in the sense that even if a victim seeks no arrest, an arrest is still required. *Manual* § 104.50(6)(a). The legislative history further supports the intent to create a mandatory arrest and thus property right because it was meant to correct the need for multiple interventions by police by requiring an arrest in the first instance, protect citizen safety, preserve police resources, and create a pro-active police response. *Manual* § 104.50(1).

b. Police Enforcement of All Restraining Orders

Further, the Operations Manual specifically enumerates when an arrest in a restraining or protective order violation is required. *Manual* at 100-64.1 - 100.68. The

Manual contains a flowchart with objective predicates for mandatory arrests in defined circumstances. In effect, this is the application of *Manual* § 104.50 to require enforcement of the panoply of protective order rules and statutes under certain circumstances, most particularly when the violation of the order can be defined as "Domestic Violence." The orders which Denver officers are commanded to enforce include those entered pursuant to the following statutory authority:

a. C.R.S. § 13-6-107 ("elder abuse");

b. C.R.S. § 14-4-101 ("domestic abuse");

c. C.R.S. § 14-4-103 (emergency protective order);

d. C.R.S. § 14-10-108 (divorce TRO);

e. C.R.S. § 14-10-107 (automatic domestic TRO);

f. C.R.S. § 18-1-1001 (protective order against criminal defendant);

g. C.R.S. § 19-2-403 (committed juvenile custody orders);

h. C.R.S. § 19-3-316 (dependency and neglect protective orders);

i. C.R.S. § 19-4-111 (temporary protective orders);

j. municipal no contact orders;

k. Colorado Rule of Civil Procedure 365 orders.

Manual at 100-65 – 100-68.

II. The Court of Appeals Decision Will Create an Incentive for State and Local Governments to Remove Statutory and Regulatory Commands that Confer a Property Right, and Such Revisions Will Destroy the System of Officer Discipline and Create

Chaos on the Streets

There are as noted in I., *infra*, numerous statutory and regulatory commands that could be read to confer a property right in police action or enforcement. To the extent that municipalities and states face liability by reason of these directives, they have an incentive to legislatively delete these provisions. "This decision ... yields a practical anomaly; states which actively promote police involvement in combating domestic violence by employing highly directive language, are subject to § 1983 litigation for their efforts, but states choosing a tepid approach are immune." *Gonzales*, 366 F.3d at 1141 (O'Brien, J., dissenting) (citation omitted). Thus, as Judge O'Brien writes, states will "adjust their statutes (not only family violence, but others as well) to avoid federal litigation and potential § 1983 liability." *Id.* The end result is that municipalities will offer officers more discretion to act under less clearly defined rules and procedures, thus destroying the equitable result the Court of Appeals must have hoped to achieve.

Further, these regulatory and statutory commands underpin the system of officer conduct and discipline. As noted, those specific rules provide for a system of officer discipline should officers transgress. If municipalities remove these rules because they believe they may confer a property right, and thus remove "those claims upon which people rely in their daily lives," *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), officers will have less guidance in terms of what to do in particular situations. Judge O'Brien noted in dissent that state alteration of statutory language to comply with the majority opinion in this case will have the collateral effect of "leaving statutes void of meaningful guidance and subject to uneven application." *Gonzales*, 366 F.2d at 1141 (O'Brien, J., dissenting).

CONCLUSION

As Judge O'Brien notes in dissent, "...*DeShaney* put to

rest the notion that simply because a state take steps to protect citizens from harm it thereby insures them against all ravages of modern life." *Gonzales*, 366 F.3d at 1132 (O'Brien, J., dissenting). Instead, the majority's decision revives claims that were put to rest by *DeShaney* and creates a font of "thinly disguised federal tort liability." *Id.* at 1133. In effect, substantive due process claims become actionable under the rubric of procedure.

The DPPA respectfully submits that the effect of the majority opinion is: (1) to confuse officers on the street as to when they should act and what procedures they should provide; (2) to create incentives for state and local governments to eliminate statutory and regulatory sections that could be read to confer a property right to police protection; and, (3) to cause more officer discretion and less uniformity in the enforcement of law.

For these reasons, the DPPA requests the Court to grant the petition and hear this case.

Respectfully submitted,

David J. Bruno
Counsel of Record
Jeffrey J. Clayton
Bruno, Bruno, & Colin, P.C.
1560 Broadway, Suite 1099
Denver, CO 80220
(303) 831-1099

Counsel for Amicus Curiae The Denver Police Protective Association

DATED: September 29, 2004

(2)

Supreme Court, U.S.
FILED
SEP 30 2004
OFFICE OF THE CLERK

No. 04-278

IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,
Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHRYN GONZALES, and LESLIE GONZALES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND NATIONAL LEAGUE OF CITIES IN SUPPORT OF PETITIONER

DAVID PARKHURST
NATIONAL LEAGUE OF CITIES
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20005
(202) 626-3033

LANI WILLIAMS
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION (IMLA)
1110 Vermont Avenue, NW
Suite 200
Washington, D.C. 20005
(202) 466-5424

BRAD D. BAILEY
Counsel of Record
Office of the City Attorney
2255 W. Berry Avenue
Littleton, CO 80165
(303) 795-3725

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI*	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	3
I. THE TENTH CIRCUIT HAS USED THE DUE PROCESS CLAUSE TO IMPOSE A DUTY TO PROTECT CITIZENS FROM ONE ANOTHER	3
II. THERE IS NO UNAMBIGUOUSLY CONFERRED RIGHT UNDER 42 U.S.C 1983 TO BE PROTECTED	6
III. THE DECISION OF THE TENTH CIRCUIT ERODES THE CONCEPT OF QUALIFIED IMMUNITY	6
CONCLUSION	8

TABLE OF AUTHORITIES

CASES

	Page
Anderson v. Creighton, 483 U.S. 635 (1987)	7
Baker v. McCollin, 443 U.S. 137 (1979)	5
Barry v. Barchi, 443 U.S. 55 (1979)	4
Bell v. Person, 402 U.S. 535 (1971)	4
Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)	7
Boddie v. Connecticut, 401 U.S. 371 (1971)	4
Cannon v. University of Chicago, 441 U.S. 677 (1979)	6
Currier v. Duran, 242 F.3d 905 (10th Cir.), *cert. denied*, 534 U.S. 1019 (2001)	7
DeShaney v. Winnebago County Dept. Of Social Services, 489 U.S. 189 (1989)	3
Doe by Nelson v. Milwaukee County, 903 F.2d 499 (7th Cir. 1990)	7
Doe by Fein v. District of Columbia, 93 F.3d 861 (D.C. Cir. 1996)	7
Doe v. Hennepin County, 585 F.2d 1325 (8th Cir. 1988)	7
Goldberg v. Kelly, 397 U.S. 254 (1970)	3, 4
Gonzales v. City of Castle Rock, 366 F.3d 1093 (2004)	3, 7
Gonzaga University v. Doe, 536 U.S. 273 (2002)	6
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	6
Jones v. Union County Tennessee, 296 F.3d 417 (6th Cir. 2002)	7
Mathews v. Eldridge, 424 U.S. 319 (1976)	3
Memphis Light, Gas & Water Division v. Kraft, 436 U.S. 1 (1978)	4
Paul v. Davis, 424 U.S. 693 (1976)	5
Saucier v. Katz, 553 U.S. 194 (2001)	6
Screws v. United States, 325 U.S. 91 (1945)	5

TABLE OF AUTHORITIES—Continued

	Page
The Slaughterhouse Cases 83 U.S. (16 Wall.) 36 (1873)	3
Touche Ross and Company v. Redington, 442 U.S. 560 (1979)	6

OTHER AUTHORITIES

Colo. Rev. Stat. § 13-14-102	4
Colo. Rev. Stat., § 18-1-1001	5
Conn. Gen Stat. Ann. § 46b-15a (2004)	5
Del. Code. Ann. tit. 10, § 1046 (2004)	5
Ky. Rev. Stat. Ann. §403.760 (2004)	5
Me. Rev. Stat. Ann. tit. 19-A, § 4012 (2004)	5
Md. Code. Ann., Cts. & Jud. Proc. §3-1503.1 (2004)	5
Minn. Stat. Ann. §518B.01 (West 2004)	5
Miss. Code Ann. §99-3-7 (2004)	5
Mo. Ann. Stat. §455.085 (West 2004)	5
Nev. Rev. Stat. Ann. 33.070 (West 2004)	5
N.H. Rev. Stat. Ann. § 173-B:9 (2004)	5
N.M. Stat. Ann. § 40-13-6 (West 1978)	5
N.C. Gen. Stat. Ann. §50B-4 (West 2004)	5
N.D. Cent. Code § 14-07.1-11 (2004)	5
Pa. Stat. Ann. tit 32, § 6113 (West 2004)	5
S.C. Code Ann. §16-3-1800 (West 2004)	5
S.D. Codified Laws § 23A-3-2.1 (West 2004)	5
Tex. Crim. Proc. Code Ann. Art. 14.03 (West 2004)	5
Wash. Rev. Code Ann. §§ 26.50.110, 26.52.070 (West 2004)	5
Wis. Stat. Ann. §813.12 (West 2004)	5

IN THE

Supreme Court of the United States

No. 04-278

TOWN OF CASTLE ROCK, COLORADO,
Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHRYN GONZALES, and LESLIE GONZALES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND NATIONAL LEAGUE OF CITIES IN SUPPORT OF PETITIONER

INTEREST OF *AMICI* [1]

The International Municipal Lawyers Association is a nonprofit, nonpartisan professional organization consisting of more than 1,400 member entities. Its membership is com-

[1] Pursuant to 37.6, *amici curiae* International Municipal Lawyers Association ("IMLA") and National League of Cities ("NLC") disclose that no counsel for any party in this case authored this brief in whole or in part. No person or entity other than *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief.

prised of local governments, including cities and counties, and subdivisions thereof as represented by their chief legal officers; state municipal leagues, and individual attorneys who represent municipalities, counties, and other local government entities.

IMLA, previously known as the National Institute of Municipal Law Officers, has provided services and educational programs to local governments and their attorneys since 1935. IMLA's Legal Advocacy Program has served municipalities by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as friend of the court on behalf of its members before this Honorable Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

The National League of Cities is the country's largest and oldest organization serving municipal government, with more than 1,600 direct member cities and 49 state municipal leagues that collectively represent more than 18,000 United States cities, villages, and towns and more than 135,000 local elected officials. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance, and to serve as a national resource and advocate for the municipal governments it represents.

The senseless tragedy that precipitated the underlying legal questions disturbs and offends *amici* and their members. The grievous facts, however, must not blot out the proper resolution of the important constitutional issues presented by the Town of Castle Rock's petition. The decision in this case by the Tenth Circuit Court of Appeals is so dramatically separated from the other circuits which have decided this issue that intervention by this Court is necessary to prevent future litigation on even more tenuous circumstances. *Amici*, as an advocate for the interest of local governments and the communities that they serve, file this brief on behalf of their

members nationwide. Letters from both parties consenting to the filing of this *amici curiae* brief are on file with the clerk.

STATEMENT OF THE CASE

Amici adopt the statement of the case and the facts as presented by Petitioner, Town of Castle Rock, Colorado.

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT HAS USED THE DUE PROCESS CLAUSE TO IMPOSE AN UNREASONABLE DUTY ON LOCAL LAW ENFORCEMENT ENTITIES AND, MORE BROADLY, MUNICIPAL GOVERNMENTS TO PROTECT CITIZENS FROM ONE ANOTHER.

The due process clause is "a restraint on the power of the States." *The Slaughterhouse Cases* 83 U.S. (16 Wall.) 36, 80 (1873). "It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to insure those interests do not come to harm through other means." *DeShaney v. Winnebago County Dept. Of Social Services*, 489 U.S. 189, 195 (1989).

The Tenth Circuit has created a property right out of whole cloth. The mere issuance of the restraining order was sufficient, in the opinion of the majority, to create a property right. *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1101, 1109 (2004), Pet. App., 11a-12a, 27a-28a. While this Court has held that entitlements are property interests to be protected by the due process clause, *see*, *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (disability benefits); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (welfare benefits), the mere existence of a court order has never been sufficient to create such a property interest.

The only decision of this Court that is remotely related is *Boddie v. Connecticut*, 401 U.S. 371 (1971) where this Court held that the Due Process Clause prevented the States from denying potential litigants the use of the courts, where such would be equivalent to preventing them an opportunity to be heard upon their claimed rights. *Id.* at 380. Here, both Mr. and Mrs. Gonzales had the ability to petition the state court for a modification of the protective order. Colo. Rev. Stat. § 13-14-102 (17.5) (2003).

The hallmark of a property right is an individual entitlement grounded in state law which cannot be removed except for cause. *Memphis Light, Gas & Water Division v. Kraft*, 436 U.S. 1, 11-12, (1978). There is no question that Colorado law entitled Mrs. Gonzales to the issuance of the restraining order protecting her and her children from being harassed or molested by her former husband. However, the Tenth Circuit has gone one step further and granted Mrs. Gonzales the entitlement to protection from any violation of the order. Liability for injury is present under this holding even if the Town had responded but, either did not do so fast enough or if the police were unable to locate Mr. Gonzales to prevent the death of the three girls.

When this Court has found that State action has resulted in a distinct alteration or extinguishment of a right or status previously recognized by State law, the procedural guarantees contained in the Fourteenth Amendment have been invoked. Here the Town of Castle Rock has done nothing to remove any right or status Mrs. Gonzales may have possessed. It has not denied to her a driver's license, *Bell v. Person*, 402 U.S. 535 (1971). It has not prevented her from a trade or otherwise licensed occupation, *Barry v. Barchi*, 443 U.S. 55, 64 (1979), nor has it deprived her of some welfare benefit generally available to all those who qualify. *Goldberg, supra.*

Moreover, this Court has repeatedly held that the deprivation of State created rights by the State does not violate the

due process clause unless those rights amount to a constitutionally protected property interest. *See, e.g., Baker v. McCollin*, 443 U.S. 137 (1979); *Paul v. Davis*, 424 U.S. 693 (1976); *Screws v. United States*, 325 U.S. 91 (1945). To turn a mere expressed intent to protect a class, even if accompanied by procedure to facilitate protection, into a property right would convert every criminal statute, and possibly every statement of policy into a constitutional right.

In Colorado, protection orders are not merely issued in domestic relations cases, as was done here, but are also issued pursuant to Colo. Rev. Stat., §18-1-1001, in every case arising under the Colorado Criminal Code. In addition, such protective orders may be issued by a County Court Judge in assault cases and such orders may also be issued in criminal municipal ordinance violations. Colo. Rev. Stat. §18-1-1001. Thousands of these orders may be issued by the Courts in Colorado in any given year.

Nor is Colorado alone in mandating the arrest of persons who violate protective orders. Some 19 additional states require an arrest when a police officer has probable cause to believe that such orders have been violated. *See*, Conn. Gen Stat. Ann. § 46b-15a (2004) (foreign only); Del. Code. Ann. tit. 10, § 1046 (2004); Ky. Rev. Stat. Ann. § 403.760 (2004); Me. Rev. Stat. Ann. tit. 19-A, § 4012 (2004); Md. Code. Ann., Cts. & Jud. Proc. §3-1503.1 (2004); Minn. Stat. Ann. § 518B.01 (West 2004); Miss. Code Ann. § 99-3-7 (2004); Mo. Ann. Stat. § 455.085 (West 2004); Nev. Rev. Stat. Ann. 33.070 (West 2004); N.H. Rev. Stat. Ann. § 173-B:9 (2004); N.M. Stat. Ann. § 40-13-6 (West 1978); N.C. Gen. Stat. Ann. § 50B-4 (West 2004); N.D. Cent. Code § 14-07.1-11 (2004); Pa. Stat. Ann. tit 32, § 6113 (West 2004); S. C. Code Ann. § 16-3-1800 (West 2004); S.D. Codified Laws § 23A-3-2.1 (West 2004); Tex. Crim. Proc. Code Ann. Art. 14.03 (West 2004); Wash. Rev. Code Ann. §§ 26.50.110, 26.52.070 (West 2004); Wis. Stat. Ann. § 813.12 (West 2004).

To allow this decision to stand creates a potential liability for local law enforcement agencies that is staggering.

II. THERE IS NO UNAMBIGUOUSLY CONFERRED RIGHT UNDER 42 U.S.C 1983 TO BE PROTECTED.

Section 1983 provides a remedy for the deprivation of rights, privileges, or immunities secured by the Constitution and laws of the United States. In order to have such a right, this Court has always required that the statute clearly benefit the individual claiming the right. *Cannon v. University of Chicago*, 441 U.S. 677, 692, n.13 (1979). Where a statute by its terms grants no private rights to any identifiable class, there can be no constitutional right. *Gonzaga University v. Doe*, 536 U.S. 273 284 (2002); *Touche Ross and Company v. Redington*, 442 U.S. 560, 576 (1979). This is in sharp contrast with the statute at the center of this controversy, which is a criminal statute punishing the violation of any protective order, thereby protecting society as a whole not just the holder of the protective order.

III. THE DECISION OF THE TENTH CIRCUIT ERODES THE CONCEPT OF QUALIFIED IMMUNITY.

Municipal employees who engage in constitutionally impermissible conduct, may nevertheless be shielded from liability for civil damages if their actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). As this Court explained in *Saucier v. Katz*, 553 U.S. 194, (2001), there must be notice to the State actor that their conduct is unlawful. *Id.* at 206. For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right, it must be clear that in light of pre-existing law the unlawfulness of the

conduct is apparent. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

In the Tenth Circuit, the law is clearly established if there is a Supreme Court or Tenth Circuit decision on point, "or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Currier v. Duran*, 242 F.3d 905, 923 (10th Cir.), *cert. denied*, 534 U.S. 1019 (2001).

Until this case, there were no Supreme Court or Tenth Circuit cases which held that a restraining order, coupled with a statute mandating its enforcement, creates a constitutional protected property interest. *Gonzales* at 1117-18. The clear weight of authority in the other circuits is just the opposite. *See*, *Doe by Nelson v. Milwaukee County*, 903 F.2d 499 (7th Cir. 1990)(rejecting a procedural due process claim for failing to investigate child abuse, finding no "entitlement" in such procedures—no entitlement triggering due process protection in statutorily required child abuse investigation); *Jones v. Union County Tennessee*, 296 F.3d 417 (6th Cir. 2002) (holding, among other things, that a state actor's violation of a Tennessee statute providing, "[t]he court shall cause a copy of the [family violence] petition . . . to be served upon the respondent at least five (5) days prior to such hearing" did not qualify as a state created liberty or property interest under *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972); *Doe v. Hennepin County*, 585 F.2d 1325 (8th Cir. 1988)(rejecting *Roth*-type claims in the provision of social services under a mandatory child abuse statute—this case was decided pre-*DeShaney*) and *Doe by Fein v. District of Columbia*, 93 F.3d 861 (D.C. Cir. 1996)(rejecting a procedural due process claim for failing to effectuate child abuse protective services, finding there is no entitlement to such protective services under mandatory child abuse statute).

Because there is now a Tenth Circuit Opinion finding that a statute mandating its enforcement through arrest or issuance

of an arrest warrant is a property right, any statute of a jurisdiction within the Tenth Circuit which mandates some action by the government creates a property right. This could include statutes or local ordinances which require the issuance of a building or zoning permit.

As this constitutional right is now clearly established in the Tenth Circuit, any failure to enforce this right, whether through delay, lack of resources, or other pressing emergencies, now creates liability for a lack of enforcement through no fault of the State actor.

Certiorari is therefore warranted to prevent the potential liability of individual officers who fail to enforce any mandatory statute.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ certiorari.

Respectfully submitted,

DAVID PARKHURST
NATIONAL LEAGUE OF CITIES
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20005
(202) 626-3033

LANI WILLIAMS
INTERNATIONAL MUNICIPAL
LAWYERS ASSOCIATION (IMLA)
1110 Vermont Avenue, NW
Suite 200
Washington, D.C. 20005
(202) 466-5424

BRAD D. BAILEY
Counsel of Record
Office of the City Attorney
2255 W. Berry Avenue
Littleton, CO 80165
(303) 795-3725

Supreme Court, U.S.
FILED
DEC 23 2004
OFFICE OF THE CLERK

(8)

No. 04-278

IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHERYN GONZALES, AND LESLIE GONZALES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S OPENING BRIEF

THOMAS S. RICE
ERIC M. ZIPORIN
Counsel of Record
Senter Goldfarb & Rice, L.L.C.
P.O. Box 22833
Denver, CO 80222
(303) 320-0509

JOHN C. EASTMAN
c/o Chapman University
School of Law
One University Drive
Orange, CA 92866

ERIK S. JAFFE
Erik S. Jaffe, P.C.
5101 34th Street, NW
Washington D.C. 20008

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether permitting a *procedural* due process claim against a local government for its failure to protect the holder of a partial restraining order from private violence, when the State itself provides no such remedy, so circumvents as to effectively repudiate this Court's holding in *DeShaney* rejecting a similar *substantive* due process claim?

2. If the Fourteenth Amendment's Due Process Clause is read to permit, via its procedural aspects, the same substantive claims already rejected by this Court in *DeShaney*, what kind of process is required for police inaction with respect to a partial restraining order *not* to violate the constitution?

PARTIES TO THE PROCEEDING

Petitioner: Town of Castle Rock, Colorado, a Colorado home rule municipal corporation.

Respondent: Jessica Gonzales, individually and as next friend of her deceased minor children Rebecca Gonzales, Katheryn Gonzales, and Leslie Gonzales.

Other Defendants Below: Aaron Ahlfinger, Robert S. Brink, and Marc Ruisi, current or former members of the Town of Castle Rock Police Department.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES v
INTRODUCTION 1
OPINIONS BELOW 2
STATEMENT OF JURISDICTION 3
PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS 3
STATEMENT OF THE CASE 6
SUMMARY OF ARGUMENT 12
ARGUMENT 15
I. The Procedural Due Process Claim Allowed Below Is Not Sanctioned By, and Would Effectively Overrule, *DeShaney* 15
A. *DeShaney* did not embrace the procedural due process claim sanctioned by the Tenth Circuit below. 15
B. The "nature" of Ms. Gonzales's asserted interest is not within the contemplation of the "liberty or property" language of the Fourteenth Amendment. 17
C. If the Tenth Circuit's rule is adopted by this Court, every *substantive* due process claim could simply be recast as a *procedural* due process claim, severely undermining *DeShaney*. 20

II. Colorado Law Did Not, and the Federal Courts Therefore Cannot, Create a *Roth*-Type Property Interest in Enforcement of Restraining Orders.....24

A. Colorado has simply established directory procedures for enforcement of restraining orders. 25

B. Even if "shall" is read as mandatory, Colorado has simply mandated enforcement procedures; it has not created a property interest either in ongoing police protection or in enforcement according to those procedures. 30

C. By invoking *Roth* to impose procedural due process liability, the Tenth Circuit has created a federal remedy that supplants the much more limited remedies provided by Colorado itself. 32

III. Affording Procedural Due Process Requirements Before State Officials *Fail* to Protect Against Private-Party Violence Would Be Utterly Impractical. 33

IV. Expanding Constitutional Liability in this Case Would Open the Door to Thousands, if Not Millions of Claims, Supplanting State Tort Law and Imposing Crushing Levels of Liability on State and Local Governments. 35

CONCLUSION 40

TABLE OF AUTHORITIES

Cases

Archie v. *City of Racine*,
847 F.2d 1211 (CA7 1988) (*en banc*) 11

Beck v. *Ohio*,
379 U.S. 89 (1964) 29

Blockburger v. *United States*,
284 U.S. 299 (1932) 27

Brinegar v. *United States*,
338 U.S. 160 (1949) 29

Cleveland Bd. of Educ. v. *Loudermill*,
470 U.S. 532 (1985) 21

Cooper v. *Hollis*,
600 P.2d 109 (Colo. App. 1979) 28, 30

County of Sacramento v. *Lewis*,
523 U.S. 833 (1998) 11

DeShaney v. *Winnebago Cty. Dept. of Soc. Servs.*,
489 U.S. 189 (1989) ..... passim

DiMarco v. *Department of Revenue, Motor Vehicle Division*, 857 P.2d 1349 (Colo. App. 1993) 30

Doe by Fein v. *District of Columbia*,
93 F.3d 861 (CADC 1996) 22, 23

Doe by Nelson v. *Milwaukee County*,
903 F.2d 499 (CA7 1990) 21, 23, 33

Doe v. *Hennepin County*,
858 F.2d 1325 (CA8 1988) 11, 23

Hewitt v. *Helms*,
459 U.S. 460 (1983) 32

In re Marriage of Helmich,
937 P.2d 897 (Colo. App. 1997) 27

Jones v. *North Carolina Prisoners' Labor Union, Inc.*,
433 U.S. 119 (1977) 32

Jones v. *Union County, Tennessee*,
296 F.3d 417 (CA6 2002) 15, 22, 23

Kentucky Dep't of Corr. v. *Thompson*,
490 U.S. 454 (1989) 29

Mathews v. *Eldridge*,
424 U.S. 319 (1976) 11, 20, 34

May v. *People*,
636 P.2d 672 (Colo. 1981) 28, 30

Morgan v. *Genesee Co., LLC*,
86 P.3d 388 (Colo. 2004) 29

Morrissey v. *Brewer*,
408 U.S. 471 (1972) 16, 17, 18, 24

Olim v. *Wakinekona*,
461 U.S. 238 (1983) 10, 29, 31

People v. Coleby,
34 P.3d 422 (Colo. 2001) 28

People v. *Hauseman*,
900 P.2d 74 (Colo. 1995) 28, 30

Reno v. *Flores*,
507 U.S. 292 (1993) 11

Sandin v. *Conner*,
515 U.S. 472 (1995) ..... passim

State v. *Nieto*,
993 P.2d 493 (Colo. 2000) 28, 30

United States v. *Dixon*,
509 U.S. 688 (1993) 27

Verrier v. *Colorado Dep't of Corrections*,
77 P.3d 875 (Colo. App. 2003) 30

Wolff v. *McDonnell*,
418 U.S. 539 (1974) 32

Youngberg v. *Romeo*,
457 U.S. 307 (1982) 19

Statutes

28 U.S.C. § 1257 3
28 U.S.C. § 1291 3
28 U.S.C. § 1331 3
28 U.S.C. § 1343 3
42 U.S.C. § 1983 ..... 3, 7
750 Ill. Comp. Stat. 60/304 35
Ark. Code Ann. § 18-16-507 38
Colo. Rev. Stat. § 12-47-301(4)(a) 39
Colo. Rev. Stat. § 14-10-108 3
Colo. Rev. Stat. § 16-8-115.5 39
Colo. Rev. Stat. § 18-6-803.5(3) ..... passim
Colo. Rev. Stat. § 18-6-803.5(5) 5, 27, 29
Colo. Rev. Stat. § 18-6-803.5(7) 5, 19
Colo. Rev. Stat. § 19-3-316(1)(d) 36
Colo. Rev. Stat. § 24-10-118 (2004) 20, 27
D.C. Stat. § 22-1321 38
Kan. Rev. Stat. § 189.940 38
La. Rev. Stat. § 28:53 38
Maine Animal Welfare Act, Me. Rev. Stat. 7 § 3906-B(11) 39
Mass. Gen. L. Ann. 111C § 1 39
Mass. Gen. Laws ch. 209A, § 7 35
Minn. Laws § 518B.01(e) 35
N.D. Stat. § 4-24-13 38

N.H. Rev. Stat. § 540:13-c 38
N.J. Stat. Ann. § 2C:25-23 (West Supp. 1992) 37
N.J. Stat. Ann. § 2C:25-7 (1981) (repealed 1982) 37
N.J. Stat. Ann. § 9:6-8.18 35
Ore. Rev. Stat. § 133.055(2)(a) 35
Tenn. Code Ann. § 36-3-611(a)(2) 36
U.S. Const. amend. XIV (Due Process Clause) ..... passim
Virgin Islands Code § 407 38

Other Authorities

BLACK'S LAW DICTIONARY (7th ed. 1999) 30
DAVIS, KENNETH CULP, POLICE DISCRETION (1975) 12
Developments in the Law: Legal Responses to Domestic Violence, Part IV, 106 HARV. L. REV. 1551 (May 1993) 37
Jones, James T. R., *Battered Spouses' Section 1983 Damage Actions Against the Unresponsive Police After* DeShaney, 93 W. VA. L. REV. 251 (1991) 16
Strauss, David A., *Due Process, Government Inaction, and Private Wrongs*, 1989 Sup. Ct. Rev. 53 (1989) 16

No. 04-278

IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHERYN GONZALES, AND LESLIE GONZALES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S OPENING BRIEF

INTRODUCTION

Respondent Jessica Gonzales ("Ms. Gonzales") suffered a grievous tragedy when her estranged husband shot and killed her three daughters before committing "suicide by cop" by opening fire at the local police station. Because Mr. and Ms. Gonzales were at the time in the middle of contentious divorce proceedings, the divorce court had issued a standard-form restraining order barring Mr. Gonzales from having contact with Ms. Gonzales and the children except

for specified "parenting time" to which he was entitled, including a prearranged mid-week dinner visit. The tragic events described above occurred during one such mid-week dinner visit.

Ms. Gonzales alleges that the dinner visit was not prearranged, and that Mr. Gonzales was therefore technically in violation of the restraining order. She further contends that the police department's failure to enforce the restraining order caused the tragic events, in violation of her right to due process under the Fourteenth Amendment.

Ms. Gonzales's allegations have yet to be proved, of course, as this case is here on the motion to dismiss filed by all Defendants, including Petitioner Town of Castle Rock ("Castle Rock"). The district court granted the motion to dismiss and the panel of the Tenth Circuit affirmed, holding that even if Ms. Gonzales could prove those allegations, this Court's decision in *DeShaney* v. *Winnebago Cty. Dept. of Soc. Servs.*, 489 U.S. 189 (1989), barred Ms. Gonzales's claims to the extent they relied on the substantive component of the Due Process Clause. Ms. Gonzales did not petition for rehearing of that holding, and the *en banc* court left it undisturbed. It is therefore no longer at issue in this case.

What is at issue here is the *en banc* Tenth Circuit's holding that Ms. Gonzales was entitled to proceed with her claim against Castle Rock via the procedural component of the Due Process Clause. Most courts to have considered the issue have recognized such claims as simply a clever attempt at circumventing *DeShaney*, and rejected them. This Court should reject them as well.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 366 F.3d 1093 (CA10 2004) (*en banc*) and reprinted at pages 1a-94a of the Petition Appendix ("PA"). The panel opinion of the Court of Appeals is reported at 307 F.3d 1258 (CA10

2002) (PA 99a-112a). The order of the District Court dismissing the complaint with prejudice is unreported, but is reproduced at PA 113a-123a.

STATEMENT OF JURISDICTION

The *en banc* decision of the Court of Appeals was entered on April 29, 2004 (PA 1a). A timely request for extension, filed on July 14, 2004, was granted by Justice Breyer on July 20, 2004, extending the time in which to file the petition for writ of certiorari until August 27, 2004. The Petition was filed on August 27, 2004, and granted by this Court on November 1, 2004. The jurisdiction of this Court is proper under 28 U.S.C. § 1254(1). Jurisdiction in the Court of Appeals was proper under 28 U.S.C. § 1291, and jurisdiction in the District Court was proper under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment provides:

> No State shall . . . deprive any person of life, liberty or property, without due process of law . . . .

Section 14-10-108 of the Colorado Revised Statutes ("C.R.S.") provides, in relevant part:

> (1) In a proceeding for dissolution of marriage, . . . (2) . . . either party may request the court to issue a temporary injunction: . . . (b) Enjoining a party from molesting or disturbing the peace of the other party or of any child; . . . .

C.R.S. § 18-6-803.5(3) provides, in relevant part:

> (a) Whenever a protection order is issued, the protected person shall be provided with a copy of such

order. A peace officer shall use every reasonable means to enforce a protection order.

(b) A peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that:

(I) The restrained person has violated or attempted to violate any provision of a protection order; and

(II) The restrained person has been properly served with a copy of the protection order or the restrained person has received actual notice of the existence and substance of such order.

(c) In making the probable cause determination described in paragraph (b) of this subsection (3), a peace officer shall assume that the information received from the registry is accurate. A peace officer shall enforce a valid protection order whether or not there is a record of the protection order in the registry.

(d) The arrest and detention of a restrained person is governed by applicable constitutional and applicable state rules of criminal procedure. The arrested person shall be removed from the scene of the arrest and shall be taken to the peace officer's station for booking, whereupon the arrested person may be held or released in accordance with the adopted bonding schedules for the jurisdiction in which the arrest is made. The law enforcement agency or any other locally designated agency shall make all reasonable efforts to contact the protected party upon the arrest of the restrained person. The prosecuting attorney shall

present any available arrest affidavits and the criminal history of the restrained person to the court at the time of the first appearance of the restrained person before the court.

(e) The arresting agency arresting the restrained person shall forward to the issuing court a copy of such agency's report, a list of witnesses to the violation, and, if applicable, a list of any charges filed or requested against the restrained person. The agency shall give a copy of the agency's report, witness list, and charging list to the protected party. The agency shall delete the address and telephone number of a witness from the list sent to the court upon request of such witness, and such address and telephone number shall not thereafter be made available to any person, except law enforcement officials and the prosecuting agency, without order of the court.

C.R.S. § 18-6-803.5(5) provides:

> A peace officer arresting a person for violating a protection order or otherwise enforcing a protection order shall not be held criminally or civilly liable for such arrest or enforcement unless the peace officer acts in bad faith and with malice or does not act in compliance with rules adopted by the Colorado supreme court.

C.R.S. § 18-6-803.5(7) provides:

> The protection order shall contain in capital letters and boid print a notice informing the protected person that such protected person may either initiate contempt proceedings against the restrained person if the order is issued in a civil action or request the prosecuting attorney to initiate contempt proceedings if the order is issued in a criminal action.

STATEMENT OF THE CASE

In *DeShaney*, this Court held that the substantive component of the Due Process Clause of the Fourteenth Amendment did not provide a cause of action against state and local governments and government officials for failure to protect individuals from the violent acts of other private individuals (other than under special circumstances not at issue here). Nevertheless, on June 23, 2000, Respondent Jessica Gonzales brought such a suit in the United States District Court for the District of Colorado against Petitioner Town of Castle Rock and three of its police officers (collectively, "Castle Rock defendants"), seeking $30 million in compensatory damages (as well as punitive damages and attorneys fees) after her three children were tragically murdered by her then-estranged husband, Simon Gonzales. PA 129a.

At the conclusion of their state-court divorce proceedings, Mr. Gonzales had been issued a perfunctory, standard-form partial restraining order directing him to avoid contact with Ms. Gonzales and her children other than during "parenting time" to which he was "entitled" every other weekend, for two weeks during the summer, and during a pre-arranged mid-week dinner visit. Complaint ¶ 9 (PA 125a-126a).[1] Ms. Gonzales contended in her federal complaint

[1] A modification to the initial temporary restraining order was entered by the Douglas County, Colorado district court on June 4, 1999. Both the initial and the modified restraining orders were submitted to the district court as attachments to defendants' motion to dismiss. The modified order (of which the lower courts apparently took judicial notice) provides, in part:

> 1. The temporary restraining order that has been previously filed by the Petitioner [Ms. Gonzales] shall be come (sic) permanent, however, said restraining order shall be modified to allow Respondent [Mr. Gonzales] to pick up the minor children from the home of the Petitioner for parenting time purposes. The remaining terms of the restraining order shall remain in effect and may be modified (or dissolved if Petitioner deems it appropriate) at permanent orders.
>
> * * *
>
> 4. Respondent, upon reasonable notice, shall be entitled to a mid-week dinner visit with the minor children. Said visit shall be arranged by the parties.

Appellant's Tenth Circuit Appendix, p. A-30; *see also* Complaint ¶ 9 (PA 125a-126a). Although the language of the modified restraining order makes it debatable whether Mr. Gonzales was even in violation of the restraining order at the time he took the children for a mid-week dinner visit, that potential factual dispute is not material to the legal issue presented here, namely, whether Castle Rock can be held liable for failing to arrest Mr. Gonzales after receipt of Ms. Gonzales's alleged report of a violation.

[2] Curiously, Ms. Gonzales did not allege in her complaint that she ever notified the police of her contention that Mr. Gonzales was actually in violation of the restraining order. She alleged only that Mr. Gonzales had taken the children mid-week around dinner time without her permission. Complaint ¶ 10 (PA 126a). She did not allege that she had informed the police that she had not given her permission for the dinner-time visit, but simply alleged that she showed to the police the restraining order, which expressly allowed mid-week dinner visits. Complaint ¶¶ 9, 11-12 (PA 126a). Based on these allegations (which Petitioner disputes), the police might reasonably have believed that Mr. Gonzales was not in violation of the order, either because he had not been served with it, or because he had permission for the Tuesday dinner visit, or because Ms. Gonzales had, contrary to the terms of the restraining order, unreasonably denied permission for a mid-week dinner visit. After all, the modified

that the partial restraining order, together with Colorado Revised Statutes § 18-6-803.5(3), bestowed upon her and her children a "property right" to police protection, and that the failure of Castle Rock police officers to protect her children (by arresting Mr. Gonzales after Ms. Gonzales informed the police that he had taken the children around dinner-time on a Tuesday evening) "constituted a denial of the due process rights of [Ms. Gonzales] and the three children in violation of the Due Process Clause of the Fourteenth Amendment . . . and 42 U.S.C. § 1983." Complaint ¶¶ 18, 20 (PA 128a).[2]

The Castle Rock defendants moved to dismiss the complaint, contending that it failed to state a claim, that the individual police officers were entitled to qualified immunity, and that Ms. Gonzales had not alleged facts sufficient to establish municipal liability by the Town of Castle Rock. PA 116a. After briefing and a hearing, the district court (Daniel, J.) dismissed the case with prejudice for failure to state a claim. PA 122a.

Although Ms. Gonzales had only generically alleged a violation of her due process rights, Complaint ¶ 20 (PA 128a), the district court treated the complaint as having alleged violations of both the substantive and procedural components of the Due Process Clause, PA 117a, 120a. The court dismissed the substantive due process claim, correctly holding that, under *DeShaney*, a State's failure to protect an individual from private violence does not violate substantive due process absent circumstances not applicable in this case. PA 119a-120a.

Recognizing that this Court's holding in *DeShaney* was limited to the substantive component of the Due Process Clause, PA 120a n.2, the district court separately considered whether Ms. Gonzales's complaint raised a procedural due process claim, namely, whether Castle Rock, by failing to enforce the partial restraining order as specified by state law, deprived her of a property interest in police protection without proper procedure, PA 120a. Finding that the enforcement obligations contained in the Colorado statute arise only upon a finding of probable cause by the police, the district court held that the Ms. Gonzales did not have a protectable property interest and that her complaint therefore did not allege facts sufficient to support a violation of the procedural component of the Due Process Clause. PA 122a.

order entered on June 4, 1999 uses the same word to describe Ms. Gonzales's obligation to arrange a mid-week dinner visit that she now claims is the basis for Petitioner's obligation to arrest Mr. Gonzales for allegedly not having done so. *See* June 4 Order, *supra* n. 1 ("a mid-week dinner visit . . . *shall* be arranged by the parties" (emphasis added)).

On timely appeal after final judgment was entered, a panel of the United States Court of Appeals for the Tenth Circuit (Seymour, J., joined by McWilliams and Gibson,[3] JJ.) agreed with the district court that *DeShaney* barred Ms. Gonzales's substantive due process claim, but reversed the district court's holding that the procedural due process claim was likewise barred. PA 106a. Relying on the fact that the procedural due process claims had been left unaddressed in *DeShaney*, and distinguishing the decisions of two other circuit courts of appeals that had refused to permit *DeShaney* to be circumvented by the simple expedient of recasting substantive due process claims in procedural due process garb, the panel held that the use of the mandatory "shall" in C.R.S. § 18-6-803.5(3) gave Ms. Gonzales an "entitlement" to police protective services that enjoyed procedural due process protection against state deprivation under *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972) . PA 106a-111a.

The Tenth Circuit granted the Castle Rock defendants' petition for rehearing *en banc* and ordered additional briefing to address "1) whether CRS 18-6-803.5(3) in conjunction with the restraining order issued by the Colorado court created a property interest entitled to due process protection and, 2) if so, what process was due." PA 98a. After reargument, a closely-divided, 6-5 *en banc* court followed the panel's lead and reversed the district court's dismissal of Ms. Gonzales's procedural due process claim.[4]

[3] Hon. John R. Gibson, Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

[4] The *en banc* court was not asked to address the district court's dismissal of Ms. Gonzales's substantive due process claim and the panel's affirmance of that aspect of the district court's holding, so the panel decision affirming dismissal remains undisturbed. PA 9a n. 3. Thus, any chal-

Judge Seymour, writing for the 6-member *en banc* majority, held that the partial restraining order, coupled with the statutory enforcement mechanism, conferred on Ms. Gonzales and her daughters "an interest in a specific benefit to which [they had] 'a legitimate claim of entitlement.'" PA 13a (quoting *Roth*, 408 U.S., at 577). The Court further held that procedural due process required Castle Rock to afford notice and a hearing to Ms. Gonzales before it failed to enforce the partial restraining order that had been issued to Mr. Gonzales. PA 30a, 32a, 42a. The Court also recognized, however, that because no "reasonable officer would have known that a restraining order, coupled with a statute mandating its enforcement, would create a constitutionally protected property interest," the individual police officers (though not the Town of Castle Rock itself) were entitled to qualified immunity. PA 43a.

Four separate opinions were filed by the five dissenting judges.

Judge Kelly, joined by Chief Judge Tacha and Judge O'Brien, viewed the relevant statute as providing only a *procedure* for the enforcement of protective orders and rejected the procedural due process claim, noting that "[i]t has always been the law that mere procedure contained in a statute does not create a property interest—were it otherwise every statute prescribing procedure would confer procedural due process rights." PA 47a-48a (citing *Olim* v. *Wakinekona*, 461 U.S. 238, 250-51 (1983)). He found that the Colorado statute, viewed as a whole, did not mandate a particular result and therefore did not create a protectable property interest. PA 49a. He found the majority's decision to the contrary to be in conflict with, among other cases, the Eighth Circuit's decision in *Doe* v. *Hennepin County*, 858 F.2d 1325, 1328

---

lenge to *DeShaney*'s substantive due process holding has been waived and is no longer an issue in this case.

(CA8 1988), and he found the majority's insistence that Castle Rock should have afforded notice and a hearing to Ms. Gonzales before failing to enforce the protective order an "utter impracticality" at odds with the *en banc* decision of the Seventh Circuit in *Archie* v. *City of Racine*, 847 F.2d 1211, 1217 (CA7 1988) (*en banc*). PA 51a, 58a.

Judge McConnell, joined by Chief Judge Tacha and Judges Kelly and O'Brien, dissented to note that even if the restraining order coupled with the Colorado statute created a property interest, Ms. Gonzales's complaint raised only a substantive and not a procedural due process claim. "Only when a plaintiff asserts that government action is procedurally unfair—usually for lack of a hearing—does the balancing test of *Mathews* v. *Eldridge*, 424 U.S. 319, 333-35 (1976), invoked by the majority [rather than the more stringent 'shocks the conscience' test of *County of Sacramento* v. *Lewis*, 523 U.S. 833 (1998)] . . . apply," wrote Judge McConnell, "yet Ms. Gonzales's complaint contains no reference to procedural issues in any form." PA 60a. He believed that the majority's holding to the contrary was at odds with *Lewis*, 523 U.S., at 846, and that the substantive relief sought by Ms. Gonzales was "in marked contrast" to the procedural relief sought in "the Supreme Court's procedural due process cases, on which the majority relie[d]." PA 63a (*citing, e.g., Roth*). Significantly, Judge McConnell noted that "[i]f the majority is correct, it will always be possible for plaintiffs to re-characterize their substantive due process claims against arbitrary action by executive officials as 'procedural due process' claims, thus avoiding the Supreme Court's exacting 'shocks the conscience' test and getting, instead, the balancing test of *Mathews*"—a maneuver rejected by this Court in *Reno* v. *Flores*, 507 U.S. 292, 308 (1993). PA 65a-66a.

Judge O'Brien, joined by Chief Judge Tacha and Judge Kelly, noted that the majority's decision ignored the guiding

principles announced in *DeShaney* and was in conflict with decisions from the Sixth, Seventh, and D.C. Circuits as well as the Supreme Court of Tennessee, the District of Colorado, and the Northern District of West Virginia. PA 67a (citing cases).

Judge Hartz, joined by Chief Judge Tacha and Judge Kelly, also dissented to caution courts against reading "full enforcement" statutes such as the Colorado statute at issue here too literally. Referencing the classic work on the subject by Professor Kenneth Culp Davis, POLICE DISCRETION, he noted that even "full enforcement" statutes "permit the exercise of police discretion regarding how much, and even whether, to enforce particular criminal statutes." PA 92a-93a. Finally, he noted that even if Colorado's statute could be read to confer on Ms. Gonzales procedural due process rights in connection with a decision whether to enforce the partial restraining order, she was given all that *procedural* due process could require under the circumstances: an opportunity to present evidence of the violation of the order and to argue why an arrest was proper. PA 94a. To hold otherwise, as the majority did, was to convert the procedural due process claim into a substantive due process claim (contrary to *DeShaney*).

SUMMARY OF ARGUMENT

This Court should reject the Tenth Circuit's effort to circumvent *DeShaney* for several reasons. First, in light of this Court's holding in *DeShaney* that the substantive component of the Fourteenth Amendment's Due Process Clause does not impose on state and local governments an affirmative obligation to prevent private-party violence, this Court should be wary of *ever* recognizing a non-traditional *Roth*-type property interest in police enforcement procedures, infringement of which would depend on the substantive result to establish a prima facie claim of procedural failure every time the police were unsuccessful in protecting against pri-

vate-party violence. *DeShaney* certainly does not compel, and arguably counsels against, recognition of the procedural due process claim accepted by the Tenth Circuit below. The "nature" of the interest asserted by Ms. Gonzales is simply not within the contemplation of the "liberty" or "property" protected by the Due Process Clause. Instead, as several of the dissenting judges correctly noted below, Ms. Gonzales's complaint is not really about any lack of process—she actually had the opportunity to be heard, on several occasions—but about the police department's alleged failure to respond to her requests in the way she would have liked. The alleged procedural failing derives only from the lack of a favorable result, and the only curative procedural remedy would presumably be one that guaranteed Ms. Gonzales a different result. That is a substantive due process claim challenging the outcome, not a procedural due process claim concerned about the kind of hearing provided, and if the Tenth Circuit's rule were to prevail, *DeShaney* would effectively be overruled, as every *substantive* claim barred by *DeShaney* could simply be recast as a *procedural* claim now permitted by the Tenth Circuit.

Second, even if this Court is inclined to recognize some kind of *Roth*-type property interest in police enforcement procedures, the Colorado enforcement scheme at issue here, properly interpreted, has not created any such property interest. When read in context, both of the statute as a whole and against the backdrop of the traditional discretion afforded to law enforcement, Colorado's enforcement regime is merely directory, not mandatory. Moreover, even if the word "shall" in the statute is read as mandatory rather than merely directory, it simply mandates police procedures; it does not create a *Roth*-type property interest either in police protection or in enforcement according to those procedures. Mere procedure contained in a statute does not create a property interest. By discovering a *Roth*-type property interest in the context of a state statute that itself affords no liability rem-

edy, the Tenth Circuit has required Colorado to recognize, as a matter of constitutional obligation, a substantive right that neither the Constitution (per *DeShaney*) nor the State had established.

Third, the Tenth Circuit's decision, if affirmed by this Court, will open up a hornets' nest of issues with respect to the kind of process that would be required before a state agency *fails* to prevent private violence in any particular case. Will listening to a complaint from the other end of a telephone line be an adequate hearing, or will police be obligated in every instance to hear the complaint in person? (Both forms of hearing were provided to Ms. Gonzales in this case.) Can whatever hearing is deemed to be required even be conducted by the police, or will a "neutral" magistrate of some kind need to be appointed? What will constitute sufficient notice that the police are not going to be able to act to prevent private violence that only becomes known in hindsight? These, and undoubtedly numerous other similarly intractable issues, only serve to highlight what Judge Kelly below correctly described as the "utter impracticality" of extending the requirements of procedural due process to failure-to-protect claims.

Finally, ratification of the Tenth Circuit's decision would convert hundreds of state procedural mandates into constitutional claims, abolishing as a matter of federal constitutional law the discretion traditionally afforded law enforcement officials, even when the States themselves have disavowed liability remedies. The expansion in both liability and litigation will have devastating consequences both for the public safety and for municipal governments throughout the Nation. Every telephone call received by a police dispatcher that alleges a violation of a restraining order containing the word "shall" would have to be given the highest priority and afforded federally imposed procedures, for example, in order to avoid constitutional liability, no matter how urgent or se-

vere other matters may be. Whether a state legislature could *ever* undermine executive discretion in such a fashion without also undermining core separation of powers principles is questionable; the federal courts certainly should not hold a legislature to have done so *by implication*.

ARGUMENT

I. The Procedural Due Process Claim Allowed Below Is Not Sanctioned By, and Would Effectively Overrule, *DeShaney*.

This Court in *DeShaney* reserved the question whether the *procedural* component of the Fourteenth Amendment's Due Process Clause (as opposed to its *substantive* component) would give rise to constitutional liability when a State failed to protect against private-party violence in the face of a *Roth*-type property interest to such protection. The Tenth Circuit, however, erroneously treated that reservation as an acknowledged exception to the *DeShaney* rule, and then read it so broadly as effectively to swallow the *DeShaney* rule itself. There are good reasons for this Court to reject the Tenth Circuit's circumvention of *DeShaney*.

A. *DeShaney* did not embrace the procedural due process claim sanctioned by the Tenth Circuit below.

In footnote 2 of its opinion in *DeShaney*, this Court declined to consider whether a state statute might provide individuals with an "entitlement" to receive governmental protective services that would enjoy procedural due process protection under *Roth*. *DeShaney*, 489 U.S., at 195 n.2. One legal scholar grappling with the import of that footnote has contended that this Court therefore only "[be]grudging[ly]" left open the possibility that a State statute might create procedural due process rights in protective services provided by the State. James T. R. Jones, *Battered Spouses' Section*

1983 Damage Actions Against the Unresponsive Police After DeShaney, 93 W. VA. L. REV. 251, 308 (1991). Professor David Strauss went even further, stating that it is not a stretch to call *DeShaney* a "case involving procedural due process" because "the distinction between substantive and procedural due process is blurred in cases of this kind." David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 Sup. Ct. Rev. 53, 60 (1989). While Professor Strauss acknowledged that neither the Court nor the plaintiffs characterized *DeShaney* as a procedural due process case, he contended that "the characterization should not dictate the way in which the case is analyzed, and there is no indication in the opinion that it did affect the Court." *Id.* Although Professor Strauss ultimately disagreed with the holding in *DeShaney*, that holding is not at issue here, and hence Professor Strauss's recognition that the analysis should be the same under either procedural or substantive due process requires the same result here as in *DeShaney*.

This Court itself demonstrated a sensible reluctance to permit procedural claims to circumvent the absence of substantive rights by citing *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972), in its brief discussion of the procedural due process claim that the *DeShaney* petitioners had not advanced. *See DeShaney*, 489 U.S., at 195. *Morrissey* involved a parolee's due process challenge to the revocation of his parole without a hearing. In deciding to extend procedural due process protections to parole revocations, this Court cautioned that the crux of the question whether the requirements of due process even apply in a given circumstance "is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." 408 U.S., at 481. This Court specifically warned in *Morrissey* that its due process flexibility was not a blank check for courts to impose due process requirements hither and yon in the first instance:

> To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

Morrissey, 408 U.S., at 481. The *Morrissey* Court then assessed the "nature of the interest of the parolee in his continued liberty," and ultimately concluded that it was such as to bring it within the protection of the Fourteenth Amendment. An assessment of the "nature" of Ms. Gonzales's claimed interest leads to the opposite result here.

B. The "nature" of Ms. Gonzales's asserted interest is not within the contemplation of the "liberty or property" language of the Fourteenth Amendment.

Every ground on which the *Morrissey* Court relied in reaching its determination that the nature of a parolee's interest in continued liberty is such as to fall within the protection of the Fourteenth Amendment demonstrates a stark contrast between the parolee's interest and the interest asserted by Ms. Gonzales here. A parolee exercises "liberty" in the way the word has been traditionally understood, even if only a conditional liberty. *Id.*, at 482. He has at least an implicit promise that his parole will be revoked only if he breaches the parole conditions. *Id.* Revocation of parole often results in lengthy incarceration. *Id.* And, one might add, revocation of parole required an affirmative act by the government.

In contrast, the interest Ms. Gonzales claims here—the right to have her ex-husband arrested any time the police have probable cause to believe he violated the restraining order in any particular, however small—is neither "liberty" nor "property" in the way those words have traditionally been understood. There may be a lot of reasons why police

might not be able to enforce the restraining order, even if there was probable cause to think it had been violated. Police often must balance competing law enforcement demands, any of which could have potentially serious consequences to the public, but it is only the rare instance in which police judgments regarding the balancing of those demands nonetheless leads to a tragic outcome. The importance of any given interest cannot be assessed only in hindsight, but has to be taken in context of the discretion required by the broader and often life-threatening demands on police time more generally. And finally, the government *inaction* alleged here is simply not comparable to the government *action* necessary to revoke parole at issue in *Morrissey*.

Roth itself, which is the touchstone for Ms. Gonzales's procedural due process claim, bolsters the point. *Morrissey* was cited by this Court in *Roth* for the proposition that "to determine whether due process requirements apply in the first place, [courts] must look not to the 'weight' but to the nature of the interest at stake." *Roth*, 408 U.S., at 570-71 (citing *Morrissey*, 408 U.S., at 481). The "nature" of the interest in *Roth* was not such as to give rise to due process protections because Roth had only an abstract desire and unilateral expectation that his employment contract would be renewed, not a legitimate entitlement to renewal of the contract.

The "nature" of the interest claimed by Ms. Gonzales here is likewise not within the contemplation of the "liberty or property" protected by the Fourteenth Amendment. Unlike the interest sought to be protected in *Morrissey* (not being in jail), or even the interest sought but rejected in *Roth* (continued employment), the interest at issue here is merely some sort of reasonable enforcement, *if* there is probable cause (the quintessential discretionary decision police make every day), and arrest, *if* practical. The nature of interest claimed by Ms. Gonzales is, in other words, quite uncertain.

Ms. Gonzales was not given 24-hour police protective service that arguably would have afforded her a legitimate entitlement *from the government*. *Cf., e.g., Youngberg* v. *Romeo*, 457 U.S. 307 (1982). Rather, she was given an order restraining *Mr. Gonzales*, with certain procedures designed, by Respondent's own admission, "*to provide guidance* to law enforcement agencies in how to go about enforcing" the restraining order. *See* Appt.'s Tenth Circuit Opening Br., at 7 (emphasis added). Those procedures were not even implicated unless the police had information amounting to probable cause that the order had been violated, and even then the particular result Ms. Gonzales desired—arrest—was but one of several alternatives permitted by the statutory scheme. Police were also specifically authorized merely to seek a warrant for an arrest if an immediate arrest was "impractical under the circumstances," C.R.S. § 18-6-803.5(3)(b), and were impliedly authorized to use other "reasonable means" to enforce the restraining order, C.R.S. § 18-6-803.5. Moreover, Ms. Gonzales was herself free to initiate contempt proceedings against Mr Gonzales. C.R.S. 18-6-803.5(7). With so many statutorily-authorized enforcement options available, Ms. Gonzales simply did not have a legal entitlement to the one particular enforcement procedure she wanted. Rather, she had only an "abstract desire" or "unilateral expectation" that the restraining order would be enforced by an arrest.[5] That is not sufficient to establish a *Roth*-type property interest.

---

[5] It is not even clear from the complaint that Ms. Gonzales actually sought an arrest rather than merely the return of her children. *See* Complaint ¶ 12, PA 126a (alleging that Ms. Gonzales showed police "a copy of the TRO and requested that it be enforced and the three children be returned to her immediately").

C. If the Tenth Circuit's rule is adopted by this Court, every *substantive* due process claim could simply be recast as a *procedural* due process claim, severely undermining *DeShaney*.

Several of the dissenting judges correctly noted below that Ms. Gonzales's complaint is not really about any lack of process—she actually had the opportunity to be heard, on several occasions—but about the police department's alleged failure to respond to her requests in the way she would have liked. *See*, *e.g.*, PA 63a (McConnell, J., dissenting) ("She cannot say she was not given a chance to be heard. She called several times and explained the situation to the police, and she met with the police in person both at her home and at the police station. The problem is not that she was denied a hearing, but that the officers failed to do their duty. The problem was with the result"). That is a substantive due process claim challenging the outcome, not a procedural due process claim concerned about the kind of hearing provided, and if the Tenth Circuit's rule to the contrary were to prevail, *DeShaney* would effectively be overruled.

While the failure to perform a state-law procedural duty may or may not give rise to a state-law claim,[6] if that is all it takes to establish a constitutional claim as well, and the supposed procedures required are actually a requirement to satisfy the *substantive* duty, then the difference between substantive and procedural due process becomes meaningless. *Id.*, at 65a ("If the majority is correct, it will always be possible for plaintiffs to re-characterize their substantive due process claims against arbitrary action by executive officials as 'procedural due process' claims, thus avoiding the Supreme Court's exacting 'shocks the conscience' test and getting, instead, the balancing test of *Mathews*. It will always

[6] Colorado permits tort claims against government officials, for example, for willful and wanton misconduct. C.R.S. § 24-10-118 (2004).

be possible to say that, before they took the complained-of action, the executive officials should have engaged in some additional deliberative process, which might have averted the problem."); *id.*, at 66a-67a ("The effect of allowing claims that are essentially substantive to masquerade as procedural is to collapse the distinction between the two components of due process and to expand greatly the liability of state and local governments"); *cf. Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 541 (1985) ("the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. 'Property' cannot be defined by the procedures provided for its deprivation any more than can life or liberty").

Even if limited to cases where restraining orders are involved, the Tenth Circuit's approach substantially undermines *DeShaney* and shifts constitutional responsibility for private violence onto government's shoulders. Moreover, as is more likely, if the reasoning of the Tenth Circuit decision is followed in all cases where a statutory obligation is made specific to an individual in numerous other ways beyond protective orders, then *DeShaney* will largely become meaningless.

D. Every other circuit to have considered the issue has rejected the Tenth Circuit's reasoning.

Every other circuit to have considered the issue presented here has rejected it, primarily on the ground that it would circumvent *DeShaney*. For example, in *Doe by Nelson* v. *Milwaukee County*, 903 F.2d 499 (CA7 1990), the Seventh Circuit, in an opinion by Judge Easterbrook, considered the identical procedural due process claim successfully pressed before the Tenth Circuit here. Wisconsin law mandated certain investigator procedures once a report of child abuse was

received, so "[f]aced with the obstacle posed by *DeShaney* to their substantive due process challenge, the Does . . . attempted to assert a violation of their *procedural* due process rights." 903 F.2d, at 502. The Seventh Circuit rejected the Does' attempt to circumvent *DeShaney*, both because of the "elusiveness of the Does' claimed entitlement"—essentially a claim for procedure before being deprived of procedure—and because it could not conceive of any process that "could possibly suffice to prevent the wrongful 'deprivation' of an investigation that [was] supposed to be accomplished within 24 hours of the filing of the report." *Id.*, at 504. The Court realized that if such claims were allowed, fire departments would "be required to hold a hearing before failing to appear at a reported blaze, lest it run afoul of the Fourteenth Amendment," and that "[s]uch a rule would trivialize the Constitution . . . ." *Id.*, at 504-05.

The D.C. Circuit reached the same conclusion six years later in *Doe by Fein* v. *District of Columbia*, 93 F.3d 861 (CADC 1996). District of Columbia law mandated certain procedures upon the receipt of a report of child neglect. *See id.*, at 867 n.8 (citing statutory provisions). Nevertheless, the court rejected the procedural due process claim raised in the case as "severely flawed." *Id.*, at 868. "[S]tate-created *procedures* do not create" an entitlement protected by the Due Process Clause, held the court, unless the plaintiff could "show that the procedures that the [government] allegedly failed to follow were enacted pursuant to a substantive constitutional obligation to protect [the plaintiff] from abuse or neglect"—a showing foreclosed by *DeShaney*. *Id.* Indeed, the D.C. Circuit, unlike the Tenth Circuit below, found the procedural due process claim "to be little more than a recasting of the substantive due process claim rejected by the Supreme Court in *DeShaney*." *Id.*; *see also Jones* v. *Union County, Tennessee*, 296 F.3d 417, 419 (CA6 2002) (finding a *Roth*-type claim for failure to serve a protection order and to provide the required protection "simply misplaced"); *cf.*

Hennepin County, 858 F.2d, at 1328-29 (pre-*DeShaney* case rejecting *Roth*-type claim to provision of child welfare services).

To be sure, the Tenth Circuit attempted below to distinguish some of these conflicting decisions, primarily by asserting that the property interest here was created by a restraining order in conjuction with a statute, not by a statute alone. PA 10a n.4. That distinction simply is unavailing. As Judge Kelly correctly noted in his dissenting opinion, the distinction drawn by the Tenth Circuit majority between procedures mandated by a statute, and those mandated by a restraining order *coupled with* a statute, is "largely a distinction without a difference." PA 45a. Moreover, it does not even serve to distinguish several of the conflicting circuit decisions, even if it had merit. *Jones*, for example, clearly involved both an ex parte restraining order and mandatory statutory language. 296 F.3d, at 420. *Doe by Nelson* and *Doe by Fein* both involved specific reports of child neglect that triggered the statutory enforcement procedures for a particular person, just as the restraining order provided to Ms. Gonzales below triggered the procedures specified by Colorado law *on behalf of a particular person . . . .*" Pet. App. 18a n.9 (emphasis added). The broad, undifferentiated mandate of a state statute becomes focused on particular individuals (and hence gives rise to a protectable property interest under the Tenth Circuit's holding) as much by the filing of a specific child abuse report with an executive branch official as by the reporting that a specific restraining order issued by a judicial official has been violated. Indeed, if the Tenth Circuit decision is read to support the proposition that a protectable, *Roth*-type property interest arises *only* when a judicial order is coupled with mandatory language in a state statute, then it would seem that *only* the courts are capable of creating *Roth*-type interests—certainly not a result envisioned by this Court in *Roth* itself.

In sum, none of the other Circuits to have considered the issue presented here have permitted a procedural due processs claim to circumvent this Court's holding in *DeShaney*. The Tenth Circuit below read footnote 2 in *DeShaney* as not only authorizing but embracing an exception large enough to swallow the *DeShaney* rule itself. This Court's passing reference to *Roth* should not be so read; its citation of *Morrissey* suggests that it did not envision a *Roth*-type exception of anywhere near the breadth of that adopted by the Tenth Circuit below, if at all; and the ongoing vitality of the sensible rule adopted in *DeShaney* depends on not creating a *Roth*–type exception of such breadth.

II. Colorado Law Did Not, and the Federal Courts Therefore Cannot, Create a *Roth*-Type Property Interest in Enforcement of Restraining Orders.

Even if some sort of the procedural due process claim not considered in *DeShaney* were now to be recognized, this Court made clear in *DeShaney* that, under *Roth*, it would first look to state law to determine whether a *Roth*-type interest even existed. As described in *Roth*:

> [P]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Roth, 408 U.S., at 577.

Properly interpreted, Colorado law has not created a *Roth*-type entitlement here, and the decision by the Tenth Circuit to the contrary has supplanted the State's enforcement procedures with a court-imposed regime of constitutional liability.

A. Colorado has simply established directory procedures for enforcement of restraining orders.

The Tenth Circuit held that mandatory language (the word "shall") in the boilerplate "Notice to Law Enforcement Officials" section on the back side of the standard-form restraining order issued to Mr. Gonzales, which parrots mandatory language in a state statute, conferred on Ms. Gonzales a property interest in police enforcement *vel non* that can only be deprived in accord with procedural due process requirements. Yet read against existing state rules and understandings, as *Roth* requires, Colorado law has not created any such entitlement.

The back side of the temporary restraining order issued to Mr. Gonzales contains the following, pre-printed "Notice to Law Enforcement Officials," which closely tracks the language of Section 18-6-803.5(3) of the Colorado Revised Statutes set forth above, *supra*, at 3:

> YOU SHALL USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING ORDER. YOU SHALL ARREST, OR, IF AN ARREST WOULD BE IMPRACTICAL UNDER THE CIRCUMSTANCES, SEEK A WARRANT FOR THE ARREST OF THE RESTRAINED PERSON WHEN YOU HAVE INFORMATION AMOUNTING TO PROBABLE CAUSE THAT THE RESTRAINED PERSON HAS VIOLATED OR ATTEMPTED TO VIOLATE ANY PROVISION OF THIS ORDER AND THE RESTRAINED PERSON HAS BEEN PROPERLY SERVED WITH A COPY OF THIS ORDER OR HAS RECEIVED ACTUAL NOTICE OF THE EXISTENCE OF THIS ORDER. YOU SHALL ENFORCE THIS ORDER EVEN IF THERE IS NO RECORD OF IT IN THE RESTRAINING ORDER CENTRAL REGISTRY. YOU SHALL TAKE THE RESTRAINED PERSON

> TO THE NEAREST JAIL OR DETENTION FACILITY UTILIZED BY YOUR AGENCY. YOU ARE AUTHORIZED TO USE EVERY REASONABLE EFFORT TO PROTECT THE ALLEGED VICTIM AND THE ALLEGED VICTIM'S CHILDREN TO PREVENT FURTHER VIOLENCE. YOU MAY TRANSPORT, OR ARRANGE TRANSPORTATION FOR, THE ALLEGED VICTIM AND/OR THE ALLEGED VICTIM'S CHILDREN TO SHELTER.

PA 91a-92a.[7]

The conditional and discretionary nature of this supposed "mandate" to law enforcement officials is evident throughout, beginning with the very first sentence directing police to use "every *reasonable* means" to enforce the order. PA 91a (emphasis added). Law enforcement is not directed to make an "arrest" in every instance, but may instead seek a warrant for arrest whenever arrest "would be impractical under the circumstances," and in either case only when the officer has "information amounting to probable cause that the restrained person has violated or attempted to violate any provision" of the order. PA 92a. The back side of the restraining order also contains a notice to restrained parties that bolsters the conditional and discretionary nature of the obligation imposed on law enforcement officials: The restrained person "*may* be arrested without notice if a law enforcement officer has probable cause to believe that [the restrained person has] knowingly violated" the order. PA 91a (emphasis added).

[7] The text of the restraining order that was included in the Petition Appendix at 89a-92a inadvertently omitted from page 92a the phrase, "AND THE RESTRAINED PERSON HAS BEEN PROPERLY SERVED WITH A COPY OF THIS ORDER." That omission has been corrected in the block quotation above.

Additionally, section 18-6-803.5(5) gives police immunity from suit when "arresting a person for violating a protection order *or otherwise enforcing a protection order,*" thus indicating that enforcement other than arrest is contemplated by the statutory scheme. The Colorado Governmental Immunity Act immunizes law enforcement officers from suit except for "willful and wanton" conduct, C.R.S. § 24-10-118, thereby further suggesting that Colorado did not intend to create a property interest, the deprivation of which could subject law enforcement officers to constitutional remedies much more far-reaching than the remedies permitted by state law. Moreover, an arrest (and subsequent prosecution) for violating the terms of a restraining order, which Ms. Gonzales believes is mandatory, would be unconstitutional if the conduct had already resulted in the imposition of criminal contempt sanctions by the court itself. *See In re Marriage of Helmich*, 937 P.2d 897, 901-02 (Colo. App. 1997) (Criswell, J., concurring in part and dissenting in part) (citing *Blockburger* v. *United States*, 284 U.S. 299 (1932); *United States* v. *Dixon*, 509 U.S. 688 (1993)); *see also* C.R.S. § 18-6-803.5(3)(d) ("The arrest and detention of a restrained person is governed by applicable constitutional and applicable state rules of criminal procedure").

A simple example demonstrates the common-sense reading of the Colorado enforcement regime as discretionary and conditional rather than mandatory. The initial restraining order provided, *inter alia*, that Mr. Gonzales "shall remain at least 100 yards away from [Ms. Gonzales's home] at all times." PA 90a.[8] There is no *mens rea* requirement in the order itself (although the pre-printed notice to restrained parties on the back of the order makes clear that a "knowing

[8] As noted in note 1 above, the order was subsequently modified to permit Mr. Gonzales to pick up the children directly from Ms. Gonzales's home for the "parenting time" to which he was entitled, including a mid-week dinner visit.

violation" of the order would be a crime, and the Colorado Supreme Court has read a "knowing" requirement into the statute, *see People v. Coleby*, 34 P.3d 422, 424 (Colo. 2001)). Read strictly, therefore, the notice to law enforcement language would have required police either to arrest Mr. Gonzales or seek a warrant for his arrest if he was even inadvertently one foot inside the 100-yard mark, when a simple "step back" request would have sufficed. That absurd result[9] hardly qualifies as a "reasonable means" of enforcing the restraining order, so the mandatory "shall arrest" language must obviously be read in light of the "reasonable means" requirement of the first sentence. *See State* v. *Nieto*, 993 P.2d 493, 501 (Colo. 2000) (statutory terms must be read in light of the entire statute, and be interpreted so as to avoid absurdity). As a result, at least some measure of the reasonable discretion traditionally afforded to law enforcement is introduced into the whole enforcement scheme. *See, e.g.*, *People* v. *Hauseman*, 900 P.2d 74, 78 (Colo. 1995) (describing police discretion in conducting an inventory search); *May* v. *People*, 636 P.2d 672, 682 (Colo. 1981) (discussing discretion in law enforcement); *Cooper* v. *Hollis*, 600 P.2d 109, 111 (Colo. App. 1979) ("it is frequently said that a police officer exercises discretion when making decisions in the performance of his duties" (though only policy-making decisions are entitled to qualified immunity)).

Yet even that level of discretion destroys Ms. Gonzales's claim of entitlement. As Judge Kelly correctly noted in his dissenting opinion below, this Court has repeatedly held that mandatory language in a state statute or regulation creates a liberty or property interest protected by the Due Process

---

[9] Another absurdity results from the interplay between the *mens rea* requirement for successful criminal prosecution, and the facial lack of any such requirement for an arrest to be required (as Ms. Gonzales interprets the restraining order and statutory language) for even inadvertent violations of the restraining order.

Clause only if the language "require[s] that a *particular* result is to be reached upon a finding that the substantive predicates are met." PA 48a (quoting *Kentucky Dep't of Corr.* v. *Thompson*, 490 U.S. 454, 464 (1989)) (emphasis added); *see also Olim*, 461 U.S., at 249-50 (finding no liberty interest in limiting prison transfers where regulations did not place substantive limits on discretion); *Sandin* v. *Conner*, 515 U.S. 472, 481 (1995) (holding that liberty interest is created only where mandatory language and substantive predicates "would produce a particular outcome").

The "substantive predicate" here—a finding of probable cause by police—is a predicate with almost infinite gradations, depending on the particular facts and circumstances of each case. *See, e.g.*, *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964); *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949). Even assuming the probable cause predicate was crystal clear in every instance, however, there are at least two, and perhaps many more, possible results permitted once that predicate is met, not the single "particular result" required by *Thompson*. Police may make an arrest, or they may merely seek a warrant for an arrest if an arrest is impractical under the circumstances. C.R.S. § 18-6-803.5(3)(b). Additionally, they apparently may use other "reasonable means" of enforcing the restraining order in the traditional exercise of their own judgment. C.R.S. § 18-6-803.5(3)(a); *see also* C.R.S. § 18-6-803.5(5) ("A peace officer arresting a person for violating a protection order *or otherwise enforcing a protection order*" shall not be liable absent bad faith) (emphasis added).

What the entirety of the text strongly suggests here is confirmed by Colorado's own courts interpreting the word "shall" in analogous statutes. Although the word "shall" within a statute is generally presumed to be mandatory, *Morgan* v. *Genesee Co., LLC*, 86 P.3d 388, 393 (Colo. 2004), the Colorado courts have recognized that the presumption obtains "[*u*]*nless the context indicates otherwise*."

DiMarco v. *Department of Revenue, Motor Vehicle Division*, 857 P.2d 1349, 1352 (Colo. App. 1993) (emphasis added). Oftentimes, the word is merely "directory," and not mandatory. *Id.* "'Shall,' in addition to its mandatory meaning, also can mean 'should,' 'may,' or 'will.'" *Verrier* v. *Colorado Dep't of Corrections*, 77 P.3d 875, 878 (Colo. App. 2003) (citing BLACK'S LAW DICTIONARY 1379 (7th ed. 1999)). It should be read and considered in conjunction with the statute as a whole, and should not be read so as to lead to an absurd result. *Nieto*, 993 P.2d, at 501. On both counts, this statute's "shall" must be read as directory rather than mandatory.

Moreover, this entire statutory enforcement scheme operates against a background of discretion on the part of law enforcement officials in determining whether to make an arrest in particular circumstances. *Hauseman*, 900 P.2d, at 78; *May*, 636 P.2d, at 682; *Cooper*, 600 P.2d, at 111. Thus, the context—both textual and background—in which the word "shall" appears in the restraining order and parallel statute strongly indicates that it is directory, not mandatory. As such, it does not give rise to a *Roth*-type property interest protected by procedural due process requirements.

B. Even if "shall" is read as mandatory, Colorado has simply mandated enforcement procedures; it has not created a property interest either in ongoing police protection or in enforcement according to those procedures.

Beyond its interpretive error in treating Colorado's statutory scheme as mandatory rather than directory, the Tenth Circuit also erroneously conflated procedural requirements with substantive right.

Judge Kelly aptly described in his dissenting opinion below that the Colorado statute (and TRO) at issue here sets out a criminal offense "and then contains procedure on how the offense is to be prosecuted." PA 47a. He then noted that mere procedure contained in a statute does not create a property interest. *Id.* (citing *Olim*, 461 U.S., at 250-55); *see also* PA 74a (O'Brien, J., dissenting) (making similar point).

This Court's decision in *Olim*, relied on by Judge Kelly, involved a procedural due process claim by a prisoner challenging the decision by Hawaii prison officials to transfer him to a prison in California in violation of the procedures mandated by Hawaii law. 461 U.S., at 243. Rejecting the claim that the mandatory language in the State's regulations created a protectable liberty interest, this Court noted:

> Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement . . . . The State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, . . . but in making that choice the State does not create an independent substantive right.

Id., at 250-51.

The Tenth Circuit's approach focusing on the mandatory language in the Colorado arrest procedure, rather than on the nature of the interest alleged, was explicitly rejected by this Court in *Sandin* as erroneously based on the "somewhat mechanical dichotomy" between mandatory and discretionary state procedures. 515 U.S., at 479. Even mandatory procedures do not create a protectable interest, according to the Court in *Sandin*, when the "nature" of the interest addressed by the procedures is not an interest of "real substance." *Id.*, at 480.

Sandin involved prison procedures, of course, but there is no coherent reason for applying its holding that statutory procedural mandates do not create constitutionally protectable interests in the prison setting but not in the law enforcement setting at issue here, at least with respect to Ms.

Gonzales's claim of entitlement to those procedures.[10] *Sandin* is, therefore, all but dispositive. Colorado's use of "shall" in its statutory enforcement scheme, even if read as mandatory, does not confer upon Ms. Gonzales a constitutional entitlement to have her ex-husband arrested. Rather, it only establishes state procedures for the enforcement of ordinary criminal law, which per *DeShaney* does not create a substantive constitutional right.

C. By invoking *Roth* to impose procedural due process liability, the Tenth Circuit has created a federal remedy that supplants the much more limited remedies provided by Colorado itself.

One of the reasons given by this Court in *Sandin* for abandoning the methodology previously employed in *Hewitt* v. *Helms*, 459 U.S. 460 (1983), was the "undesirable effect" that the *Hewitt* approach had "led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone." 515 U.S., at 482. This Court further noted that the *Hewitt* approach ran "counter to the view expressed in several of [this Court's] cases that federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment." *Id.*, at 482-83 (citing *Wolff* v. *McDonnell*, 418 U.S. 539, 561-63 (1974); *Hewitt*, 459 U.S., at 470-471; and *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977)).

---

[10] This Court did suggest in *Sandin* that part of the old jurisprudence it was abandoning in the case, namely, the drawing of negative inferences from mandatory language in the text of prison regulations, "may be entirely sensible in the ordinary task of construing a statute defining rights and remedies available to the general public." 515 U.S., at 481. But that bit of *dicta* suggests only that *Mr. Gonzales* would have a right *not to be arrested—i.e.*, not to be deprived of his traditional liberty interest in freedom from restraint—without a finding of probable cause, not that *Ms. Gonzales* has a constitutionally-protected interest in having him arrested upon a finding of probable cause.

What is true in the prison setting at issue in *Sandin* is equally true of law enforcement activities more generally, including those at issue here. Federal courts ought to afford appropriate deference and flexibility to state officials trying to balance numerous, volatile, and often competing law enforcement obligations.

Colorado has sought to direct the efforts of law enforcement by providing guidelines for the enforcement of restraining orders, but it provided law enforcement officers immunity from suit for any failure to follow those guidelines unless their conduct was "willful and wanton," and even then authorized tort remedies, not constitutional ones. *Sandin* counsels that Colorado's enforcement regime should be given deference by the federal courts, not trumped with an expansive reading of the Due Process Clause.

III. Affording Procedural Due Process Requirements Before State Officials *Fail* to Protect Against Private-Party Violence Would Be Utterly Impractical.

Judge Easterbrook's decision for the Seventh Circuit in *Doe by Nelson* highlights another important basis for rejecting the Tenth Circuit's rule in this case. He could not conceive of any process that "could possibly suffice to prevent the wrongful 'deprivation' of an investigation that [was] supposed to be accomplished within 24 hours of the filing of the report." 903 F.2d, at 504. Yet conceiving of appropriate procedures before a police department *fails* to enforce a restraining order is just what the Tenth Circuit has now required of the district courts under its jurisdiction.

Just framing the question demonstrates the difficulty with the Tenth Circuit's position. This is not a case where the police department affirmatively sought to have Ms. Gonzales's protection order revoked, where requirements of notice and a hearing before a neutral arbiter would make some sense. Rather, the Tenth Circuit majority has now required some

kind of process every time the police fail to act, or decline to act with sufficient dispatch, at the behest of one who holds a protection order, apparently without regard to whether the requested action was warranted, whether the necessary manpower was available, or even whether a city-wide emergency prevented an immediate response.

Just what level of process will be required under such a regime was largely left unanswered by the Tenth Circuit majority, which mentioned only a "right to be heard" "at a meaningful time and in a meaningful manner." PA 30a (quoting *Mathews*, 424 U.S., at 333). Whatever is required at this "meaningful hearing," it is apparently more than that suggested by Judge Hartz in dissent: the right to "(1) to present evidence of a violation of the order and (2) to argue why an arrest is the proper response to the violation." PA 91a. Ms. Gonzales *was* afforded that opportunity. That the police allegedly did not act on the information she provided, or allegedly did not, in hindsight, reach the correct judgment, is not a function of the process that was afforded, but of the substantive conclusion reached (assuming it was even a *conclusion*, rather than merely inadvertent inaction), as Judge McConnell correctly pointed out in his dissent. PA 58a.

Nevertheless, if the Tenth Circuit's decision were to be adopted by this Court, the lower courts will be required to undertake the tall task of designing the procedures that will be required before a police officer *fails* to act, and to hold municipal governments to the predictably disastrous consequences of liability for violating whatever procedures are conceived.

IV. Expanding Constitutional Liability in this Case Would Open the Door to Thousands, if Not Millions of Claims, Supplanting State Tort Law and Imposing Crushing Levels of Liability on State and Local Governments.

A. The Tenth Circuit's decision would convert hundreds of procedural mandates into constitutional claims.

Under the Tenth Circuit's reasoning, countless other statutes already on the books will give rise to constitutional claims asserting procedural due process violations whenever the police or other governmental officials are unsuccessful at thwarting private violence. In Massachusetts, for example, "Law enforcement officers *shall* use every reasonable means to enforce . . . abuse prevention orders." Mass. Gen. Laws ch. 209A, § 7. As with the Colorado statutory scheme at issue here, the Massachusetts statute contains mandatory language and is coupled with a particular prevention order. In Minnesota, "A peace officer *shall* arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated [a domestic abuse protection] order." Minn. Laws § 518B.01(e). Again, mandatory language is coupled with a protection order.

Other events may also trigger procedures specified in a state enforcement statute. For example, In New Jersey, "The Bureau of Children's Services . . . *shall* upon receipt of [a] report [of suspicious injury to a child], take action to insure the safety of the child." N.J. Stat. Ann. § 9:6-8.18. *See also, e.g.*, 750 Ill. Comp. Stat. 60/304 ("Whenever a law enforcement officer has reason to believe that a person has been abused, neglected, or exploited by a family or household member, the officer shall immediately use all reasonable means to prevent further abuse, neglect, or exploitation"); Ore. Rev. Stat. § 133.055(2)(a) ("when a peace officer responds to an incident of domestic disturbance and has prob-

able cause to believe that an assault has occurred between family or household members, . . . the officer *shall* arrest and take into custody the alleged assailant"); Tenn. Code Ann. § 36-3-611(a)(2) ("Any law enforcement officer *shall* arrest the respondent without a warrant if . . . [t]he officer has reasonable cause to believe the respondent has violated or is in violation of an order for protection") (emphasis added throughout).

Even assuming, *arguendo*, a narrow construction of the holding below as limited to situations where a restraining order combines with a statute to create a "property" interest, such situations will arise under numerous statutory schemes throughout the country. As *amici* have noted, nineteen states in addition to Colorado require an arrest where there is probable cause to believe that a protection order has been violated. Brief of *Amici Curiae* International Municipal Lawyers Association and National League of Cities in Support of the Petition ("IMLA Br."), at 5 (citing statutes).

The Tenth Circuit's holding will also apply to other statutory provisions in Colorado and elsewhere. For example, section 19-3-316(1)(d) of the Colorado Revised Statutes provides: "At any time that [a] law enforcement agency . . . has reason to believe that a violation of [a child protection order] has occurred, it *shall* enforce the order." (Emphasis added). The child protection order, coupled with the mandatory language in the statute, will give rise to constitutional claims of municipal liability for every failure to protect against private violence. Not only will municipal governments be besieged with such claims, but they will effectively become insurers against third party violence should the Tenth Circuit's holding be allowed to stand.

Restraining orders are issued routinely in Colorado and throughout the country in a wide variety of cases. As *amici* have noted, such orders are issued in ordinary criminal cases in addition to domestic violence or custody cases. IMLA Br.

at 4-5. A simple Westlaw search reveals over 4,000 cases discussing violations of restraining orders.[11] And the number of cases that actually made it into Westlaw surely underestimates the number of restraining orders issued, and even the number of violations of such orders, by a substantial amount. In short, there is nothing unique about the circumstances that gave rise to this case, and the Tenth Circuit's rule, if adopted by this Court, has the potential to spawn thousands of due process claims that could bankrupt municipal governments in the process, given the inevitability of less-than-perfect enforcement. Even if unsuccessful, the flood of claims would be a tremendous burden on municipal governments.

Alternatively, the decision could result in a weakening of state statutes for which victims' advocates have lobbied. *Compare* N.J. Stat. Ann. § 2C:25-7 (1981) (repealed 1982), with *id.* § 2C:25-23 (West Supp. 1992); *see also Developments in the Law: Legal Responses to Domestic Violence, Part IV*, 106 HARV. L. REV. 1551, 1564 n. 88 (May 1993) (New Jersey's action "may well be an example of how the prospect of the enforcement of entitlement rights through liability suits may in fact deter the kind of progressive legislation that battered women seek"); *Sandin*, 515 U.S., at 482 (rejecting claim that protectable liberty interests arise from mandatory procedural regulations because of the "undesirable" effect of creating "disincentives for States to codify prison management procedures in the interest of uniform treatment"). Federal courts should not lay such a heavy hand on evolving state efforts to address such quintessentially local issues of crime and violence. *Cf. Sandin*, 515 U.S., at 482 (describing as one "undesirable effect" of treating mandatory procedural regulations as a liberty interest "the in-

---

[11] Search conducted on October 14, 2004 of all federal and state cases using the search phrase violat! /10 restraining /2 order, which yielded 4214 cases.

volvement of federal courts in the day-to-day management of prisons").

Nor is the Tenth Circuit's reasoning limited to domestic violence statutes. A police officer's failure promptly to eject a trespasser would give rise to constitutional liability in the face of mandatory statutory language coupled with a specific ejectment order.[12] Police discretion in enforcing noise ordinances would be replaced by a regime of constitutional liability for failure to enforce.[13] A State's failure promptly to enforce patent protection statutes would give rise to claims of constitutional violations.[14] And countless statutory mandates describing the rules by which police, fire fighters, and ambulance drivers undertake their jobs would result in constitutional claims for any shortcomings.[15]

---

[12] *See, e.g.*, Ark. Code Ann. § 18-16-507 ("Upon receipt of a writ of ejectment from the clerk of the circuit court, the sheriff or police chief *shall immediately* proceed to execute the writ in the specific manner described in this section and, if necessary, ultimately by ejecting from the property described in the writ the defendant"); N.H. Rev. Stat. § 540:13-c ("a writ of possession shall be issued and the sheriff *shall evict* the tenant as soon as possible"); Virgin Islands Code § 407 ("In the event any person is illegally on the property of the hotel, the hotelkeeper may solicit the aid of any member of the police, and it *shall* be the obligation of every member of the Police Force, at the request of the hotelkeeper, to evict immediately such person from the property of the hotel and with the use of force no greater than the circumstances require").

[13] *See, e.g.*, D.C. Stat. § 22-1321 ("Whoever, with intent to provoke a breach of the peace, . . . acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others, . . . shall be fined not more than $250 or imprisoned not more than 90 days, or both");

[14] *See* N.D. Stat. § 4-24-13 ("Within sixty days from the date [samples from genetically-engineered crops] are taken, an independent laboratory shall conduct all tests to determine whether patent infringement has occurred").

[15] *See, e.g.*, Kan. Rev. Stat. § 189.940 ("upon approaching any red light . . . [the driver of an emergency vehicle] *shall* slow down as necessary for safety to traffic"); La. Rev. Stat. § 28:53 ("If necessary, peace officers shall apprehend and transport . . . a [substance abuse] patient on whom an emergency certificate has been completed to a treatment facility at the request of either the director of the facility, the certifying physician or psychologist, the patient's next of kin, the patient's curator, or the agency legally responsible for his welfare"); Maine Animal Welfare Act, Me. Rev. Stat. 7 § 3906-B(11) ("The commissioner, in cooperation with animal control officers, *shall* investigate complaints of cruelty to animals and enforce cruelty-to-animal laws"); Mass. Gen. L. Ann. 111C § 1 ("A[n emergency medical services] service zone provider shall be staffed and equipped to be available for primary ambulance service or EMS first response 24 hours a day, seven days a week").

B. The impact on State and Local Government would be devastating.

Judge O'Brien aptly described in his dissenting opinion below the new order that will prevail for municipal liability if the Tenth Circuit's decision is affirmed. "Qualified immunity has now been substantially eroded, if not eliminated," he said, "in all cases based upon mandatory and directive language contained in a statute." PA 81a. "Almost any such case, cleverly pled, will survive a motion to dismiss and quite possibly a motion for summary judgment," he added, noting the "rippling effects" that will flow from the fact that "[w]ith the loss of immunity from liability goes the loss of immunity from suit." *Id.*

Judge O'Brien rhetorically wondered, for example, whether the Superintendent of the Colorado Mental Health Institute and the district attorney would be liable if, after having probable cause that a conditionally-released mentally ill patient was no longer eligible for conditional release, the patient caused some injury, or whether police departments would be liable to a victim of a drunk or underage driver for failing to ensure that no alcoholic beverages were ever sold by an unlicensed vendor—the relevant Colorado statutes contain the same kind of mandatory language found in the statute at issue here. *Id.* at 81a n.12 (citing Colo. Rev. Stat. §§ 16-8-115.5; 12-47-301(4)(a)).

Whether or not the States wish to become insurers against private violence and open themselves up to such crippling liability, it should be their decision, not the decision of the federal courts expansively interpreting the Due Process Clause.

CONCLUSION

For the foregoing reasons, the decision of the Tenth Circuit should be reversed, and the decision of the District Court granting Defendants' Motion to Dismiss should be reinstated.

Respectfully submitted,

THOMAS S. RICE
ERIC M. ZIPORIN
Counsel of Record
Senter Goldfarb & Rice, L.L.C.
P.O. Box 22833
Denver, CO 80222
(303) 320-0509

JOHN C. EASTMAN
c/o Chapman University
School of Law
One University Drive
Orange, CA 92866

ERIK S. JAFFE
Erik S. Jaffe, P.C.
5101 34th Street, NW
Washington D.C. 20008

Counsel for Petitioners

Dated: December 23, 2004

Supreme Court, U.S.
FILED
FEB 10 2005
OFFICE OF THE CLERK

No. 04-278

In The Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHERYN GONZALES, AND LESLIE GONZALES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF ON THE MERITS

BRIAN J. REICHEL
Counsel of Record
LAW OFFICE OF BRIAN J. REICHEL
5023 West 120th Avenue, #326
Broomfield, CO 80020
303-465-9034

DAVID T. ODOM
ODOM & ASSOCIATES, P.C.
24724 Royal Lytham
Naperville, IL 60564

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ADDITIONAL STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	4
SUMMARY OF THE ARGUMENT	9
ARGUMENT	11
I. NO *DESHANEY* CONFLICT EXISTS	11
A. The Opinion Below Properly Applied *Roth*	13
B. The Circuit Court Cases Relied Upon By Petitioner Are Inapposite	15
II. COLORADO LAW CREATED A *ROTH*-TYPE ENTITLEMENT TO POLICE ENFORCEMENT OF RESPONDENT'S RESTRAINING ORDER	18
A. The Terms of the Restraining Order and Colorado's Statutory Enforcement Scheme Are Much More Than Mere "Directory Procedures."	19
B. The Mandatory Enforcement Terms of the Order and Statute Are Not Inconsistent With Police Discretion With Respect to Probable Cause Determinations	27
III. THE PROCESS DUE RESPONDENT IS SIMPLE AND PRACTICAL	32
IV. THE TENTH CIRCUIT'S HOLDING IS NARROWLY TAILORED AND OF LIMITED APPLICABILITY TO OTHER FACT PATTERNS	34
CONCLUSION	38

TABLE OF AUTHORITIES

Page

CASES

Anaya v. Crossroads Managed Care Sys., Inc., 195 F.3d 584 (10th Cir. 1999) 28

Barry v. Barchi, 443 U.S. 55 (1979) 14

Beck v. Ohio, 379 U.S. 89 (1964) 28

Bell v. Burson, 402 U.S. 535 (1971) 14

Bills v. Henderson, 631 F.2d 1287 (6th Cir. 1980) 32

Bishop v. Wood, 426 U.S. 341 (1976) 18

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) ..... *passim*

Campbell v. Campbell, 294 N.J. Super 18, 682 A.2d 272 (Law Div. 1996) 29, 31

Coffman v. Wilson Police Dep't, 739 F. Supp. 257 (E.D. Pa. 1990) 25, 26

Cosco v. Uphoff, 195 F.3d 1221 (10th Cir. 1999) 32

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 13

Currier v. Doran, 242 F.3d 905 (10th Cir. 2001) 30

DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989) 9, 11, 12, 14

Doe v. Hinnepin County, 858 F.2d 1325 (8th Cir. 1988) 15

Doe by Fein v. District of Columbia, 93 F.3d 861 (D.C. Cir. 1996) 15

Doe by Nelson v. Milwaukee County, 903 F.2d 499 (7th Cir. 1990) 15

Goldberg v. Kelly, 397 U.S. 254 (1970) 14

TABLE OF AUTHORITIES – Continued

Page

Gonzales v. City of Castle Rock, 307 F.3d 1258 (10th Cir. 2002) 35

Gonzales v. City of Castle Rock, 366 F.3d 1093 (10th Cir. 2004) 36, 37

Goss v. Lopez, 419 U.S. 565 (1975) 14

Guffey v. Wyatt, 18 F.3d 869 (10th Cir. 1994) 28, 29

Jennings v. City of Stillwater, 383 F.3d 1199 (10th Cir. 2004) 16, 35, 38

Jones v. City and County of Denver, 854 F.2d 1206 (10th Cir. 1988) 28

Jones v. Union County, 296 F.3d 417 (6th Cir. 2002) 15, 16, 17, 18

Logan v. Simmerman Brush Co., 455 U.S. 422 (1982) 14

Macaluso v. Knowles, 341 N.J. Super 112, 775 A.2d 108 (App. Div. 2001) 29

Malley v. Briggs, 475 U.S. 335 (1986) 28

Mathews. v. Eldridge, 424 U.S. 319 (1976) 14, 32, 33, 34

Meador v. Cabinet for Human Resources, 902 F.2d 474 (6th Cir. 1990) 25

Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) 14

Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978) 5

Nearing v. Weaver, 295 Or. 702, 670 P.2d 137 (1983) ... 29, 31

Pierce v. Delta County Dep't of Social Servs., 119 F. Supp. 2d 1139 (D. Colo. 2000) 16

Perry v. Sindermann, 408 U.S. 593 (1972) 14

TABLE OF AUTHORITIES – Continued

Page

Semple v. City of Moundsville, 963 F. Supp. 1416 (N.D. W. Va. 1997) 16, 17, 18

Siddle v. City of Cambridge, 761 F. Supp. 503 (S.D. Ohio 1991)..... 24, 25, 26

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969)..... 14

Taylor By and Through Walker v. Ledbetter, 818 F.2d 791 (11th Cir. 1987)..... 25

Washington v. Starke, 855 F.2d 346 (6th Cir. 1988)..... 32

United States v. Davis, 197 F.3d 1048 (10th Cir. 1999)..... 28

STATUTES

42 U.S.C. § 1983 .....4, 11, 16, 27

C.R.S. § 14-10-108 ..... 1, 5, 6, 20, 24

C.R.S. § 14-10-109 ..... 1, 20, 24

C.R.S. § 18-6-803.5 34

C.R.S. § 18-6-803.5(3)..... 22, 24, 26, 27

C.R.S. § 18-6-803.5(3)(b)(I)..... 30, 31

C.R.S. § 18-6-803.5(5)..... 24

C.R.S. § 18-6-803.7 ..... 1, 22

C.R.S. § 18-6-803.7(2)(b) 6

Fed. R. Civ. P. 12(b)(6)..... 5, 30

U.S. Const. Amend. XIV, § 1.....4, 11, 12, 15

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

1994 Legislature Strengthens Domestic Violence Protective Orders, 23 Colo. Lawyer 2327 (Oct. 1994) 20

Booth, *Colo. Socks Domestic Violence*, Denver Post, June 24, 1999, at A1 21

Miccio, *A House Divided: Mandatory Arrest, Domestic Violence and the Conservatization of the Battered Women's Movement*, ___ Houston L. Rev. ___ (2004)..... 22

Sanko, *Stopping Domestic Violence: Lawmakers Take Approach of Zero Tolerance as They Support Bill, Revamp Laws*, Rocky Mountain News, May 15, 1994, at 5A..... 21

Transcript of February 15, 1994, Colorado House Judiciary Committee Hearings on House Bill 1253 ..... 20, 21

ADDITIONAL STATUTORY PROVISIONS

Section 14-10-108 of the Colorado Revised Statutes ("C.R.S.") provides in relevant part:

> (1) In a proceeding for dissolution of marriage, . . .
>
> (2) . . . either party may request the court to issue a temporary injunction: . . .
>
> (b) enjoining a party from molesting or disturbing the peace of the other party or of any child;
>
> (c) excluding a party from the family home or from the home of the other party upon a showing that physical or emotional harm would otherwise result.

C.R.S. § 14-10-109 states:

> The duties of peace officers enforcing orders issued pursuant to section 14-10-107 or 14-10-108 shall be in accordance with section 18-6-803.5, C.R.S., and any rules adopted by the Colorado supreme court pursuant to said section.

C.R.S. § 18-6-803.7 provides in relevant part:

> (1) As used in this section:
>
> (a) "Bureau" means the Colorado bureau of investigation.
>
> (b) "Protected person" means the person or persons identified in the restraining order as the person or persons for whose benefit the restraining order was issued.
>
> (c) "Registry" means a computerized information system.

(d) "Restrained person" means the person identified in the order as the person prohibited from doing the specified act or acts.

(e) "Restraining order" means any order that prohibits the restrained person from contacting, harassing, injuring, intimidating, molesting, threatening, or touching any person, or from entering or remaining on premises, or from coming within a specified distance of a protected person or premises, that is issued by a court of this state or an authorized municipal court, and that is issued pursuant to ... section 14-10-108, C.R.S.,. . . .

(f) "Subsequent order" means an order which amends, modifies, supplements, or supersedes a restraining order.

(2)(a) There is hereby created in the bureau a computerized central registry of restraining orders which shall be accessible to any state law enforcement agency or to any local law enforcement agency having a terminal which communicates with the bureau. The central registry computers shall communicate with computers operated by the state judicial department.

(b) Restraining orders and subsequent orders shall be entered into the registry by the clerk of the court issuing the restraining order; except that orders issued pursuant to sections 18-1-1001 and 19-2-707, C.R.S., shall be entered into the registry only at the discretion of the court or upon motion of the district attorney. The clerk of the court issuing the restraining order shall be responsible for updating the registry electronically in a timely manner to ensure the notice is as complete and accurate as is reasonably possible with

regard to the information specified in subsection (3) of this section.

(c) The restrained person's attorney, if present at the time the restraining order or subsequent order is issued, shall notify the restrained person of the contents of such order if the restrained person was absent when such order was issued.

(d) Restraining orders and subsequent orders shall be placed in the registry not later than twenty-four hours after they have been issued; except that, if the court issuing the restraining order or subsequent order specifies that it be placed in the registry immediately, such order shall be placed in the registry immediately.

(e) Upon reaching the expiration date of a restraining order or subsequent order, if any, the bureau shall note the termination in the registry.

(f) In the event the restraining order or subsequent order does not have a termination date, the clerk of the issuing court shall be responsible for noting the termination of the restraining order or subsequent order in the registry.

(3)(a) In addition to any information, notice, or warning required by law, a restraining order or subsequent order entered into the registry shall contain the following information, if such information is available:

(I) The name, date of birth, sex, and physical description of the restrained person to the extent known;

(II) The date the order was issued and the effective date of the order if such date is different from the date the order was issued;

(III) The names of the protected persons and their dates of birth;

(IV) If the restraining order is one prohibiting the restrained person from entering in, remaining upon, or coming within a specified distance of certain premises, the address of the premises and the distance limitation;

(V) The expiration date of the restraining order, if any;

(VI) Whether the restrained person has been served with the restraining order and, if so, the date and time of service; and

(VII) The amount of bail and any conditions of bond which the court has set in the event the restrained person has violated a restraining order.

(b) If available, the restraining order or subsequent order shall contain the fingerprint based state identification number issued by the bureau to the restrained person.

STATEMENT OF THE CASE

The Respondent, Jessica Gonzales, brought an action under 42 U.S.C. § 1983 in the United States District Court for the District of Colorado against the Petitioner and three of its police officers. Ms. Gonzales' complaint alleged that the due process rights of her and her three (now deceased) daughters under the Fourteenth Amendment to the United States Constitution had been violated by the individual police officers because of their failure and

refusal to enforce a restraining order against Ms. Gonzales' estranged husband. The complaint also asserted a claim against the Petitioner based on its failure to train its law enforcement officers properly, and its maintenance of an official custom or policy of failing and refusing to respond properly to restraining order violations, pursuant to *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

Before any answer to the complaint was filed, the district court dismissed the complaint on a motion made under Fed. R. Civ. P. 12(b)(6), holding that neither the procedural nor substantive components of the Due Process Clause provided the basis for a cognizable claim against the Petitioner or any of the individual officers. PA at 113a-123a. A panel of the Tenth Circuit Court of Appeals unanimously affirmed the district court's ruling as to the substantive due process claim, but reversed the district court's determination that Ms. Gonzales failed to state a cognizable claim for the violation of her and her daughters' procedural due process rights. PA at 99a-112a. On rehearing *en banc*, the Tenth Circuit Court of Appeals held that Ms. Gonzales was entitled to proceed against the Petitioner on her *Monell* procedural due process claim, but further held that the individual police officers were entitled to qualified immunity as to the procedural due process claim against them. PA at 1a-44a.

On May 21, 1999, Ms. Gonzales obtained a temporary restraining order limiting her husband's ability to have contact with her and their daughters, aged ten, nine and seven. The restraining order was issued by a state court in accordance with Colo. Rev. Stat. § 14-10-108, and commanded in part that Mr. Gonzales "not molest or disturb the peace of [Ms. Gonzales] or . . . any child." PA at 89a-92a. The restraining order further stated "the court . . .

finds that physical or emotional harm would result if you are not excluded from the family home," and directed Mr. Gonzales to stay at least 100 yards away from the property at all times. *Id. See also* Colo. Rev. Stat. § 14-10-108(2)(c) (party can be excluded from family home upon a showing that physical or emotional harm would otherwise result). Neither parent nor the daughters could unilaterally change the terms of the order because it explicitly states:

> IF YOU VIOLATE THIS ORDER THINKING THE OTHER PARTY OR A CHILD NAMED IN THIS ORDER HAS GIVEN YOU PERMISSION, YOU ARE WRONG, AND CAN BE ARRESTED AND PROSECUTED. THE TERMS OF THIS ORDER CANNOT BE CHANGED BY AGREEMENT OF THE OTHER PARTY OR THE CHILD(REN), ONLY THE COURT CAN CHANGE THIS ORDER.

The restraining order also contained explicit terms directing law enforcement officials that they "shall use every reasonable means to enforce" the restraining order, they "shall arrest" or where impractical, seek an arrest warrant for those who violate the restraining order, and they "shall take the restrained person to the nearest jail or detention facility. . . ." *Id.*

Upon the trial court's issuance of the restraining order, and pursuant to Colo. Rev. Stat. § 18-6-803.7(2)(b), the order was entered into the state's central registry for such protective orders, which is accessible to all state and local law enforcement agencies. On June 4, 1999, the order was served on Mr. Gonzales. On that same date, upon "having heard the stipulation of the parties, and after placing the parties under oath and examining the parties

as to the accuracy of the Stipulation . . . and finding that [the] Stipulation [was] in the best interests of the minor children," 10th Cir. Appdx. at A-30; PA at 125a-126a, the state court made the restraining order permanent. The order's terms were slightly modified to detail Mr. Gonzales' rights to parenting time with his daughters on alternative weekends, and for two weeks during the summer. The order also allowed Mr. Gonzales "upon reasonable notice . . . a mid-week *dinner* visit with the minor children. Said visit shall be arranged by the parties." *Id.* (emphasis added). Finally, the order allowed Mr. Gonzales to collect the girls from Ms. Gonzales' home for the purposes of parental time. However, all other portions of the temporary restraining order remained in force, including its command that Mr. Gonzales was excluded from the family home and that he could not "molest or disturb the peace" of Ms. Gonzales or the girls. *Id.*

Despite the order's terms, on Tuesday, June 22, 1999, sometime between 5:00 and 5:30 p.m., Mr. Gonzales abducted the girls while they were playing outside their home. Mr. Gonzales had not given Ms. Gonzales advanced notice of his interest in spending time with his daughters on that Tuesday night, nor had the two previously agreed upon a mid-week visit. When Ms. Gonzales realized her daughters were missing, she suspected that Mr. Gonzales, who had a history of erratic behavior and suicidal threats, had taken them. At approximately 7:30 p.m., she made her first phone call to the Castle Rock police department requesting assistance in enforcing the restraining order against her husband. Officers Brink and Ruisi were sent to her home. Upon their arrival, she showed them a copy of the restraining order, and asked that it be enforced and her children returned to her immediately. In contradiction

to the order's terms, the Officers "stated that there was nothing they could do about the [restraining order] and suggested that Plaintiff call the Police Department again if the children did not return home by 10:00 p.m." PA at 126a-127a.

About an hour later, Ms. Gonzales spoke to Mr. Gonzales on his cellular telephone and he told her he was with the girls at Elitch Gardens, an amusement park in Denver. She immediately made a second call to the Castle Rock police department, and spoke with Officer Brink, requesting that the police find and arrest Mr. Gonzales. Officer Brink refused to do so, and suggested Ms. Gonzales wait until 10:00 p.m. to see if the girls returned home. Shortly after 10:00 p.m., Ms. Gonzales called the police department and reported to the dispatcher that her daughters had yet to be returned home by their father. She was told to wait for another two hours. At midnight, she called the police department again and informed the dispatcher her daughters were still missing. She then proceeded to Mr. Gonzales' apartment complex and found no one at home. From there, she placed a fifth call to the police department and was advised by the dispatcher to wait at the apartment complex until the police arrived. No officers ever came to the complex, and at 12:50 a.m., Ms. Gonzales went to the Castle Rock police station, where she met with Officer Ahlfinger. Officer Ahlfinger took an incident report from Ms. Gonzales, but he made no further effort to enforce the restraining order against her husband or to find her children. Instead, he went to dinner. PA at 126a-127a.

At approximately 3:20 a.m., nearly eight hours after Ms. Gonzales first contacted the police department, Mr. Gonzales arrived at the Castle Rock police station in his

truck. He got out and opened fire on the station with a semi-automatic handgun he had purchased soon after abducting his daughters. He was shot dead at the scene. The police found the bodies of the three girls, who had been murdered by their father earlier that evening, in the cab of the truck. PA at 127a.

SUMMARY OF THE ARGUMENT

The issue before this Court is distinct from the substantive due process claim addressed by this Court in *DeShaney v. Winnebago County Dep't of Soc, Servs.*, 489 U.S. 189 (1989). This Court is not being asked to address whether Ms. Gonzales had a substantive right under the Constitution to receive government protection that could not be denied without a reasonable justification in the service of a legitimate government objective. Rather, this Court must determine whether the state of Colorado created for Ms. Gonzales an entitlement that cannot be taken away from her without procedural due process, and if so, whether Castle Rock's arbitrary denial of that entitlement was procedurally unfair under the well-pleaded facts of Ms. Gonzales' complaint.

The state court's issuance of the restraining order to Ms. Gonzales, containing mandatory language and specific objective criteria curtailing the decisionmaking discretion of police officers, clearly commanded that the domestic abuse restraining order be enforced. The mandatory statute, its legislative history, and the grant of immunity to officers for the erroneous enforcement of restraining orders provides added weight to this conclusion. For this Court to hold otherwise would render domestic abuse

restraining orders utterly valueless and law enforcement agencies completely unaccountable to the legislative or judicial branches of government.

"It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972). There can be no doubt Ms. Gonzales and her daughters relied on the State's promises of enforcement of the restraining order to go about their daily lives. Nor can there be any doubt, based upon the factual allegations contained in Ms. Gonzales' complaint (which must be taken as true at this stage of the proceedings), that their reliance was arbitrarily undermined by the failure of the Castle Rock police to enforce the restraining order, resulting in an unspeakably tragic outcome.

The process set up in Colorado's statutory scheme was that the police must, in a timely fashion, consider the merits of any request to enforce a restraining order and, if such a consideration reveals probable cause, the police must enforce the order. Here, Ms. Gonzales alleges that due to the city's policy and custom of failing to properly respond to complaints of restraining order violations, she was denied the process laid out in the statute. The police did not consider her request in a timely fashion, but instead repeatedly required her to call the station over several hours. The statute promised a process by which her restraining order would be given vitality through careful and prompt consideration of an enforcement request, and the Constitution requires no less. Denial of that process drained all of the value from her property interest in the restraining order.

If one considers the Constitutional process to include a right to be heard, Ms. Gonzales was deprived of that process because, according to her allegations, the police never "heard" nor seriously entertained her request to enforce and protect her interests in the restraining order. Alternatively, if one considers that the process to which she was entitled was a bona fide consideration by the police of a request to enforce a restraining order, she was denied that process as well. According to Ms. Gonzales' allegations, the police never engaged in a bona fide consideration of whether there was probable cause to enforce the restraining order. Their response, in other words, was meaningless, which rendered her property interest in the restraining order a nullity.

Based on the well-pleaded facts of Ms. Gonzales' complaint, she has adequately stated a procedural due process claim upon which relief can be granted. She had a property interest in the enforcement of the restraining order which was allegedly taken from her without due process of law. Her § 1983 action should therefore proceed in the trial court.

ARGUMENT

I. NO *DESHANEY* CONFLICT EXISTS.

The Fourteenth Amendment specifies that no State shall "deprive any person of life, liberty, or property, without due process of law. . . . " U.S. Const. Amend. XIV, § 1. This Court, in *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989), emphasized that "the Due Process Clause of the Fourteenth Amendment was intended to prevent government from 'abusing [its] power,

or employing it as an instrument of oppression'" and "'to secure the individual from the arbitrary exercise of the powers of government.'" (citations omitted). While *DeShaney* held that the Due Process Clause of the Fourteenth Amendment generally confers no affirmative right to protection against private violence, it entirely declined to address whether the State can deprive a private individual of such protection, without any procedural due process whatsoever, once it has been given by the State. In *DeShaney*, 489 U.S. 189, 195 n.2 (1989), this Court stated: "Petitioners also argue that the Wisconsin child protection statutes gave Joshua an 'entitlement' to receive protective services in accordance with the terms of the statute, an entitlement which would enjoy due process protection against state deprivation under our decision in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)."

The issue before this Court is distinct from the substantive due process claim addressed in *DeShaney*. Castle Rock asserts that, by concluding that Ms. Gonzales has a protected property right in the enforcement of her restraining order, the Tenth Circuit Court of Appeals has carved out an exception contrary to *DeShaney* and the general rule that the state does not have an affirmative duty to protect individuals from private third parties. However, *DeShaney* limited its constitutional review to whether a substantive due process right to government protection exists in the abstract, and specifically did not decide whether a state might afford its citizens an "entitlement" to receive protective services in accordance with the terms of a court order and statute, which would enjoy procedural due process protection against state deprivation under *Roth*.

A procedural due process claim is based on "a denial of fundamental procedural fairness," while a substantive claim is based on the "exercise of power without any reasonable justification in the service of a legitimate governmental objective." *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998). Ms. Gonzales is not alleging that Castle Rock's denial of her enforcement rights arose out of unjustified governmental action. Rather, her claim is that it was procedurally unfair for the Castle Rock police arbitrarily to decline to perform duties required of them pursuant to a mandatory court order which provided her a substantive property right under state law, and pursuant to a state statute commanding the same. Moreover, Ms. Gonzales is not asserting she has a right in the rare air to specific police action. Rather, pursuant to her restraining order and Colorado statutory law, the state of Colorado gave Ms. Gonzales a protected interest in police enforcement action. Hence, her case clearly falls within the rubric of procedural due process and should be analyzed as such.

A. The Opinion Below Properly Applied *Roth*.

This Court's analysis, therefore, must start with the familiar rule of *Roth*. In *Roth*, this Court noted that "property" is a "broad and majestic term." *Roth*, 408 U.S. at 571. This Court "made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money," *id.* at 571-72, and "may take many forms," *id.* at 576. "Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or

understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577. A property interest is created when a person has secured an interest in a specific benefit to which the individual has "a legitimate claim of entitlement." *Id.* The interest must be more than an "abstract need or desire" or a "unilateral expectation of" the benefit. *Id.*

This Court has accordingly identified property rights protected under the procedural due process clause to include continued public benefits. *Perry v. Sindermann*, 408 U.S. 593, 602-03 (1972) (a free education); *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (garnished wages); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969) (professional licenses); *Barry v. Barchi*, 443 U.S. 55, 64 (1979) (driver's licenses); *Bell v. Burson*, 402 U.S. 535, 539 (1971) (causes of action); *Logan v. Simmerman Brush Co.*, 455 U.S. 422, 428 (1982) (the receipt of government services); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978) (utility services); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (disability benefits); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (welfare benefits). Thus, the specific government benefit Ms. Gonzales claims, the government service of enforcing the objective terms of the court order protecting her and her children against her abusive husband, fits within the other types of *Roth* entitlements acknowledged by the Supreme Court and is properly deemed a property interest.

Although *DeShaney* made clear "that the Due Process Clauses generally confer no affirmative right to governmental aid," 489 U.S. at 196, a *Roth*-type entitlement is subject to procedural due process protections, and such protections are not contrary to *DeShaney*. The fact that, absent limited exceptions, there is no violation of the

substantive component of the Fourteenth Amendment's Due Process Clause if the State fails to protect against private violence does not mean that, once given by the State, the State can arbitrarily take such protections away without running afoul of the Clause's procedural component if they rise to the level of a *Roth*-type entitlement. Certainly, the State is under no affirmative obligation under the Due Process Clause to provide private citizens with such things as welfare or disability benefits, but, once such benefits that rise to the level of a *Roth*-type entitlement have been provided by the State, this Court consistently has held that they cannot arbitrarily be taken away without proper procedural due process protections.

B. The Circuit Court Cases Relied Upon By Petitioner Are Inapposite.

All of the cases relied upon by Petitioner in support of an alleged circuit conflict are readily distinguishable. None of those cases involved a restraining order violation, let alone the violation of a court order of any kind. Each of those cases addressed arguments that a violation of a state statute *alone* created some kind of protected property interest. *See, e.g., Jones v. Union County*, 296 F.3d 417 (6th Cir. 2002) (alleged failure by sheriff to serve *ex parte* protection order); *Doe by Fein v. District of Columbia*, 93 F.3d 861 (D.C. Cir. 1996) (alleged violation of District of Columbia statute regarding procedures for investigating child abuse and neglect); *Doe by Nelson v. Milwaukee County*, 903 F.2d 499 (7th Cir. 1990) (alleged violation of Wisconsin statute requiring social services department to investigate a report of child abuse within 24 hours); *Doe v. Hinnepin County*, 858 F.2d 1325 (8th Cir. 1988) (alleged violation of Minnesota statute regarding child abuse

investigations); *Pierce v. Delta County Dep't of Social Servs.*, 119 F. Supp. 2d 1139 (D. Colo. 2000) (alleged failure to report child abuse allegations, as required by Colorado statute); *Semple v. City of Moundsville*, 963 F. Supp. 1416 (N.D. W. Va. 1997) (alleged failure to advise of certain rights of domestic abuse victim or serve temporary protective order in violation of West Virginia statute). In the present case, the Tenth Circuit examined whether the terms of a court-issued restraining order *and* a statute mandating its enforcement created a property interest. None of the cases cited by Castle Rock contain an analogous fact pattern or analysis. Moreover, the Tenth Circuit in its recent opinion of *Jennings v. City of Stillwater*, 383 F.3d 1199 (2004), made clear that its opinion at bar is not to be construed as sanctioning the creation of a property interest out of a statutory mandate alone.

Although most of these cases have arisen in the context of child abuse allegations, *Jones* and *Semple* did involve restraining orders, albeit in completely different contexts. In *Jones*, an ex-wife sued a county and sheriff's department under § 1983, alleging, among other things, that her *substantive* due process rights were violated when she was shot by her ex-husband after the sheriff's department failed to serve him with a protection order. She made no claim that her *procedural* due process rights were violated. While analyzing the ex-wife's claim of a "special relationship" with the defendants as a result of obtaining the protective order, the Sixth Circuit stated in dicta:

> In this connection, we note that Plaintiff's reliance upon *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), for the proposition that a violation of a state statutory provision may give rise to a

> violation of a substantive due process right under the Fifth or Fourteenth Amendment is simply misplaced. *Roth* is unavailing because that case only involved the entitlement to procedural due process arising from a property interest created by state law. In any event, this Court has held that a violation of a state statute does not create a liberty interest or property right under the Due Process Clause of the Fourteenth Amendment. *See Harrill v. Blount County, Tenn*, 55 F.3d 1123, 1125 (6th Cir. 1995) ("The violation of a right created and recognized only under state law is not actionable under § 1983.").

Jones, 296 F.3d at 529. The Sixth Circuit in *Jones* never undertook any procedural due process analysis because no such claim was asserted by the ex-wife.

In *Semple*, the administrators of the estates of a woman, her brother, and her friend who were murdered by the woman's boyfriend brought procedural due process claims against a municipality. Although the woman had obtained a protective order against the boyfriend, her brother and friend were not included in the order and the order did not prohibit the boyfriend from having contact with them. *Semple*, 963 F. Supp. at 1431. Furthermore, the order had never been served on the boyfriend. *Id.* Nonetheless, the plaintiffs in *Semple* claimed two distinct entitlements which allegedly derived from state statutes: as domestic violence victims, to be notified by the police of certain remedies available to them, and to timely service of the protective order issued against the boyfriend. *Id.* The *Semple* court found that, assuming that they were even applicable to the facts of the case, the statutes at issue merely codified certain procedures for dealing with domestic violence and/or child abuse and did "not address,

in any manner whatsoever, the service of a protective order." *Id.* at 1431-32. The court in *Semple* never addressed the issue of whether the plaintiffs had a property right in the enforcement of a protective order, because no such argument was ever advanced and the facts did not support such an argument in the first place. Simply stated, *Jones* and *Semple* involved very different fact patterns and claims from those at issue in this case.

II. COLORADO LAW CREATED A *ROTH*-TYPE ENTITLEMENT TO POLICE ENFORCEMENT OF RESPONDENT'S RESTRAINING ORDER

This Court, in *Roth*, held that property interests created by state law are afforded due process protection. 408 U.S. 564. "For purposes of a § 1983 action, whether a property interest exists is dependent on state law." *Bishop v. Wood*, 426 U.S. 341, 344 (1976). These interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth* at 577, 92 S.Ct. at 2709. State law in the form of statutes, rules, regulations or policy statements may give rise to a protected liberty or property interest that cannot be infringed absent observations of due process. *Id.*

A. The Terms of the Restraining Order and Colorado's Statutory Enforcement Scheme Are Much More Than Mere "Directory Procedures."

The Tenth Circuit emphasized that Ms. Gonzales' entitlement to police enforcement of the restraining order against Mr. Gonzales arose when the state court judge issued the order, which defined Ms. Gonzales' rights. The restraining order was granted to Ms. Gonzales based on the court's finding that "irreparable injury would result to the moving party if no order were issued," PA at 89a-90a, and that "physical or emotional harm would result if [Mr. Gonzales was] not excluded from the family home." *Id.* By its specific terms, the order made clear that Mr. Gonzales could not "molest or disturb the peace" of Ms. Gonzales or her children. *Id.* Likewise, the order gave notice to Mr. Gonzales that he could "be arrested without notice if a law enforcement officer [had] probable cause to believe that [he] knowingly violated the order." *Id.* at 91a.

The restraining order's language also clearly evinced the state's intent that its terms be enforced by the police. Included within the order was a notice to law enforcement officials stating "[y]ou *shall* use every reasonable means to enforce this restraining order." *Id.* It further dictated that an officer *shall* arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of the restrained person when you have information amounting to probable cause that the restrained person has violated or attempted to violate any provision of this order and the restrained person has been properly served with a copy of this order or has received actual notice of the existence of this order. *Id.* at 91a-92a (emphasis added). Additionally, officers were required to enforce the order

"even if there is no record of it in the restraining order central registry." *Id.* Finally, the order commanded that the officers "shall take the restrained person to the nearest jail or detention facility utilized by your agency." *Id.*

Not only does the court order itself mandate that it be enforced, but the Colorado legislature passed a series of statutes to ensure its enforcement. The front of Ms. Gonzales' restraining order states that it was issued pursuant to Colo. Rev. Stat. § 14-10-108. That statute details that a party may request the court to issue an order "[e]njoining a party from molesting or disturbing the peace of the other party or of any child [or][e]xcluding a party from the family home ... upon a showing that physical or emotional harm would otherwise result." Colo. Rev. Stat. § 14-10-108(2)(b)-(c). In addition, Colo. Rev. Stat. § 14-10-109 dictates that "[t]he duties of police officers enforcing orders issued pursuant to ... 14-10-108 shall be in accordance with section 18-6-803.5, C.R.S ...." Colo. Rev. Stat. § 14-10-109.

In 1994, Colorado adopted a statutory scheme to strengthen domestic violence protective orders. *See 1994 Legislature Strengthens Domestic Violence Protective Orders,* 23 Colo. Lawyer 2327 (Oct. 1994). The Legislature's purpose in doing so was to counteract the societal and historical tendency not to enforce laws against domestic violence, to emphasize the need for enforcement of existing laws, and to provide guidance to law enforcement agencies in how to go about enforcing them. *Id.; see also* Transcript of February 15, 1994, House Judiciary Committee Hearings on House Bill 1253 at 2-5 & 40-42 (attached as Exhibit C to Respondent's Opening Brief in the Tenth Circuit Court of Appeals).

The state's intent in creating a protected interest in the enforcement of restraining orders is highlighted by the legislative history for the statute, which emphasizes the importance of the police's mandatory enforcement of domestic restraining orders. Recognizing domestic abuse as an exceedingly important social ill, lawmakers:

> wanted to put together a bill that would really attack the domestic violence problems ... and that the perpetrator has to be held accountable for his actions, and that the victim needs to be made to feel safe.
>
> First of all, ... *the entire criminal justice system must act in a consistent manner, which does not now occur. The police must make probable cause arrests. The prosecutors must prosecute every case.* Judges must apply appropriate sentences, and probation officers must monitor their probationers closely. And the offender needs to be sentenced to offender-specific therapy.
>
> *So this means the entire system must send the same message and enforce the same moral values, and that is abuse is wrong and violence is criminal.* And so we hope that House Bill 1253 starts us down this road.

Tenth Circuit Appendix at 121-122, Transcript of Colorado House Judiciary Hearings on House Bill 1253, February 15, 1994 (emphasis added); *see also* Michael Booth, *Colo. Socks Domestic Violence,* Denver Post, June 24, 1994, at A1 (law mandates arrest when restraining order is violated or police suspect domestic violence); John Sanko, *Stopping Domestic Violence: Lawmakers Take Approach of Zero Tolerance as They Support Bill, Revamp Laws,* Rocky Mountain News, May 15, 1994, at 5A (police must arrest and remove accused when answering domestic

violence calls). Clearly, the Colorado legislature intended to alter the fact that the police were not enforcing domestic abuse restraining orders.[1]

Among other things, the legislation that was enacted in 1994 created in the Colorado Bureau of Investigations a computerized central registry of restraining orders which is accessible to any state or local law enforcement agency. Colo. Rev. Stat. § 18-6-803.7. Any Colorado court issuing a restraining order is required, within 24 hours of the order's issuance, to enter the order and certain identifying information regarding the restrained person into the central registry. *Id.*

The statutory scheme adopted by the Legislature in 1994 also imposed an affirmative duty on the part of police officers to protect persons who have a valid restraining order. Colo. Rev. Stat. § 18-6-803.5(3) provides in pertinent part:

> (a) Whenever a restraining order is issued, the protected person shall be provided with a copy of such order. A peace officer *shall* use every reasonable means to enforce a restraining order.

[1] Colorado was not alone in this respect. In the early 1990's, state legislatures across the country finally took notice of the problems endemic to the criminal justice system in dealing with violence against women and children and agreed that radical and beneficial change was needed to ensure that women could rely on consistent enforcement of court-issued protection orders. By 1994, the majority of states to have considered the issue had passed statutes mandating arrest when there is probable cause to believe that a violation of a protection order has occurred. *See* G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence and the Conservatization of the Battered Women's Movement*, ___ Houston L. Rev. ___ (2004).

> (b) A peace officer *shall* arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probably cause that:
>
> (I) The restrained person has violated or attempted to violate any provision of a restraining order; and
>
> (II) The restrained person has been properly served with a copy of the restraining order or the restrained person has received actual notice of the existence and substance of such order.
>
> (c) In making the probable cause determination described in paragraph (b) of this subsection (3), a peace officer *shall* assume that the information received from the registry is accurate. A peace officer *shall* enforce a valid restraining order whether or not there is a record of the restraining order in the registry.

(Emphasis added.)

Significantly, the legislature included in the statute a provision which states that:

> [a] peace officer arresting a person for violating a restraining order or otherwise enforcing a restraining order shall not be held criminally or civilly liable for such arrest or enforcement unless the peace officer acts in bad faith and with malice or does not act in compliance with rules adopted by the Colorado supreme court.

Colo. Rev. Stat. § 18-6-803.5(5). Hence, even if an officer is mistaken in his or her determination that there is probable cause a domestic abuse restraining order is being violated, the officer will not be held liable. Rather than "suggesting that Colorado did not intend to create a property interest," Petitioner's Opening Brief at 27, the passage of subsection (5) supports the legislature's goal that officers be vigilant and consistent in enforcing restraining orders by relieving them of any fear that an erroneous enforcement of restraining orders might result in liability. It also supports the conclusion that the state of Colorado fully intended that the recipient of a domestic abuse restraining order have an entitlement to its enforcement

Ms. Gonzales' right to a restraining order against her estranged husband for the protection of herself and her children was established by statute, C.R.S. § 14-10-108. Ms. Gonzales sought and obtained such an order in this case. As a matter of law, "such an order incurs a duty on the part of the government. It is immaterial that the right is created by a judicial function at the statutory behest of the [Colorado] General Assembly." *Siddle v. City of Cambridge*, 761 F.Supp. 503, 508 (S.D. Ohio 1991). A restraining order such as Ms. Gonzales' "would have no valid purpose unless a means to enforce it exists." *Id.* In Colorado, this enforcement mechanism is established by statue at C.R.S. § 18-6-803.5(3).[2]

[2] Under C.R.S. § 14-10-109, "(t)he duties of peace officers enforcing orders issued pursuant to section 14-10-107 or 14-10-108 shall be in accordance with section 18-6-803.5."

This statute imposes a mandatory, affirmative duty on the part of police officers to protect persons who have a valid restraining order. The word "shall," which is used throughout the statute, is mandatory, not merely precatory, and provides Ms. Gonzales and her deceased daughters with "a legitimate claim of entitlement," *Roth*, 408 U.S. at 577, to police protection and enforcement of the subject restraining order. On its face, the subject provision creates in favor of Ms. Gonzales a property interest in her restraining order and a corresponding duty on the part of the Castle Rock to enforce the restraining order that is cognizable under *Roth*. Castle Rock's failure to perform adequately its statutory duties in this regard constituted a denial of Ms. Gonzales' procedural due process. *See Coffman v. Wilson Police Dept.*, 739 F.Supp 257, 263-66 (E.D. Pa. 1990) (properly served protective order issued pursuant to the Pennsylvania Protection from Abuse Act created special relationship between police and spousal victim and, thus, created constitutionally protected "property interest" in police enforcement); *Siddle*, 761 F.Supp. at 509-10 (protective order issued to prevent domestic abuse creates a property right that incurs a duty on the part of the state to protect the beneficiary of the order, and failure to do so may constitute denial of right to procedural due process); *see also Meador v. Cabinet for Human Resources*, 902 F.2d 474 (6th Cir.), *cert denied*, 498 U.S. 867 (1990) (finding procedural due process interest in favor of foster care children under Kentucky's mandatory protection against abuse statutes); *Taylor By and Through Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (same under Georgia's statutory scheme).

Although no reported Circuit Court decision (other than the one at bar) has yet to address the precise issue presented in this appeal, two reported district court cases (*Coffman* and *Siddle*) have done so. In both of those cases, the district court found that the issuance of a restraining order, *in and of itself*, incurred a procedural due process right to the holder of the restraining order in "reasonable protection" or a "reasoned police response." *Siddle*, 761 F.Supp. at 510; *Coffman*, 739 F.Supp. at 266. This right was so articulated in the absence in either of those cases of any specific enforcement mechanism dictated by statute. In the present case, the Colorado Legislature has expressed in Colo. Rev. Stat. § 18-6-803.5(3) the procedural due process right to "every reasonable means to enforce" the restraining order, including the "arrest" or "warrant for the arrest" of a violator of a restraining order.

The language commanding that the officers use "every reasonable means to enforce this restraining order," PA at 91a, in no way undermines the order's mandatory nature. First, the order's more general command of enforcement by "every reasonable means" does not negate its more specific command that officers shall make arrests or obtain arrest warrants when certain requirements are met. Second, the order's language commanding that officers use every reasonable means to enforce the order simply indicates there may be instances where the mandatory duty of enforcing a restraining order could be accomplished through means other than arrest.

In her complaint, Ms. Gonzales specifically alleged that she had a valid restraining order against her estranged husband, Simon Gonzales, which ordered him not to molest or disturb her or her three children; that the information regarding the restraining order was entered

into the Colorado central registry on May 21, 1999 and was accessible to Castle Rock; that the restraining order was duly served on Simon Gonzales on, and made permanent by stipulation effective as of, June 4, 1999; that the order was violated by Simon Gonzales on June 22 1999; and that on June 22, Ms.Gonzales informed Castle Rock police officers of the violation and, on repeated occasions on June 22, requested their assistance in enforcing the order, but Castle Rock refused to enforce the order as required by C.R.S. § 18-6-803.5(3). PA at 125a-127a. As a matter of law, Ms. Gonzales has alleged a cognizable claim under 42 U.S.C. § 1983 for procedural due process violations with respect to the property interests of her and the three children in the subject restraining order and the concomitant police protection and enforcement duties.

B. The Mandatory Enforcement Terms of the Order and Statute Are Not Inconsistent With Police Discretion With Respect to Probable Cause Determinations.

A fundamental flaw in the analysis of Castle Rock is its misreading of the mandatory enforcement language of C.R.S. § 18-6-803.5(3) as being triggered if, and only if, a police officer has determined at his or her own "discretion" that probable cause exists of a restraining order violation. The issue of whether probable cause exists is not, however, a mere subjective discretionary determination to be made by a police officer. Rather, whether probable cause exists is an *objective* standard. "Probable cause exists if the facts and circumstances within the arresting officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to lead a prudent person to believe that the arrestee has committed or is committing an

offense." *Jones v. City and County of Denver*, 854 F.2d 1206, 1210 (10th Cir. 1988). The determination of whether probable cause to arrest exists necessarily involves questions of fact. *See, e.g., Anaya v. Crossroads Managed Care Sys., Inc.*, 195 F.3d 584 (10th Cir. 1999); *Guffey v. Wyatt*, 18 F.3d 869 (10th Cir. 1994).

In this context, a police officer's finding of probable cause is not a wholly discretionary determination which undermines the mandatory edict of the restraining order or statute. While an officer must obviously exercise some judgment in determining the existence of probable cause, the validity and accuracy of that decision is reviewed under objectively ascertainable standards and judged by what a reasonably well trained officer would know. *See Malley v. Briggs*, 475 U.S. 335, 345 (1986); *see also Beck v. Ohio*, 379 U.S. 89, 96 (1964) ("When the constitutional validity of an arrest is challenged, it is the function of a court to determine whether the facts available to the officers at the moment of the arrest would warrant a man of reasonable caution in the belief that an offense has been committed.") (quotation and citation omitted); *United States v. Davis*, 197 F.3d 1048, 1051 (10th Cir. 1999) (probable cause is measured against objective standard and evaluated against what a prudent, cautious and well trained officer would believe).

An officer must certainly exercise a measure of judgment and discretion in determining whether probable cause exists. There may be, for instance, circumstances where a police officer determines a technical violation of a restraining order to be immaterial and properly concludes, in his own discretion, that probable cause does not exist, such as when the restrained individual is found standing 99 yards away from the family home when the restraining

order requires him to remain at least 100 yards away at all times. In making that decision, the officer is bound to "facts and circumstances within the arresting officer's knowledge and of which he or she has reasonably trustworthy information [which] are sufficient to lead a prudent person to believe the arrestee has committed or is committing an offense." *Guffey*, 18 F.3d at 873 (internal quotation omitted); *see also Nearing v. Weaver*, 295 Or. 702, 670 P.2d 137, 142 & n.7 (1983) (duty to arrest domestic order violator not discretionary despite requirement that arrest be supported by probable cause); *Campbell v. Campbell*, 294 N.J. Super. 18, 682 A.2d 272, 274-75 (Law Div. 1996) (same), *rejected in part on other grounds by Macaluso v. Knowles*, 341 N.J. Super. 112, 775 A.2d 108, 111 (App. Div. 2001). Thus, an officer's determination of probable cause is not so discretionary as to eliminate the protected interest asserted here in having the restraining order enforced according to its terms. The officer must make a decision which, upon review, will be deemed right or wrong. Moreover, once probable cause exists, any discretion the officer may have possessed in determining whether or how to enforce the restraining order is wholly extinguished. If the officer has probable cause to believe the terms of the court order are being violated, the officer is required to enforce the restraining order.

The officers here were not faced with the necessity of making an instant judgment in a rapidly evolving situation. More importantly, they were not given carte blanche discretion to take no action whatsoever. The restraining order and its enforcement statute took away the officers' discretion to do nothing and instead mandated that they use every reasonable means, up to and including arrest, to

enforce the order's terms. Hence, while the police officers may have some discretion in how they enforce a restraining order, this by no means eviscerates the underlying entitlement to have the order enforced if there is probable cause to believe the objective predicates are met.

Ms. Gonzales' complaint alleges more than sufficient facts which, when taken as true as they must be for purposes of a Rule 12(b)(6) motion, establish that the Castle Rock police officers had "information amounting to probable cause that [Simon Gonzales] has violated or attempted to violate any provision of a restraining order." C.R.S. § 18-6-803.5(3)(b)(I).

In assessing Ms. Gonzales' complaint on a 12(b)(6) motion, this Court must construe the allegations in the complaint, and any reasonable inferences to be drawn therefrom, in favor of Ms. Gonzales. *Currier v. Doran*, 242 F.3d 905, 911 (10th Cir. 2001). Here, the complaint specifically alleges that the restraining order, which expressly precluded Simon Gonzales from molesting or disturbing the peace of Ms. Gonzales or the three children, was made permanent on June 4, 1999, with the exception that Simon Gonzales was allowed to have contact with the three children for "parenting time" purposes, which was defined as, among other things, a prearranged, advance notice mid-week dinner visit, and two non-consecutive weeks during the summer. PA at 125a-126a. The complaint further alleges that on the evening of Tuesday, June 22, 1999, Simon Gonzales took the three girls from Ms. Gonzales' home without her knowledge or permission and without any advance notice or arrangements having been made for Simon Gonzales to have any "parenting time" with the three children for that evening, and that Ms. Gonzales notified Castle Rock of the restraining order and

its violation, and requested on several occasions that Castle Rock assist her. PA at 126a-127a. When read in the light most favorable to Ms. Gonzales, a reasonable inference can be drawn from these complaint allegations that Castle Rock had information amounting to probable cause that Simon Gonzales was in violation of the restraining order against him. Armed with such information, Castle Rock was required by the plain language of the court order and C.R.S. § 18-6-803.5(3) to perform the non-discretionary, ministerial task of using "every reasonable means to enforce" the restraining order and to "arrest" or "seek a warrant for the arrest of" Simon Gonzales for his violations of the restraining order. Castle Rock's failure to follow this legislative and court mandate denied Ms. Gonzales and her three daughters their fundamental due process rights.

Under the circumstances alleged in the complaint, C.R.S. § 18-6-803.5(3) and the court order mandated that the Castle Rock police officers enforce the restraining order. *Id.* "The statute allows no discretion." *Campbell*, 682 A.2d at 274 (interpreting similar provision of New Jersey's Prevention of Domestic Violence Act, which provides that a defendant "shall be arrested and taken into custody by a law enforcement officer" when the "officer finds that there is probable cause that a defendant has committed contempt of" a restraining order); *see also Nearing*, 670 P.2d at 142 (purpose of similar Oregon statute [ORS 133.310(3)] requiring a police officer to arrest and take into custody any person who he has probable cause to believe has violated a restraining order "was to negate any discretion. . . . in enforcing restraining orders issued under Oregon's Abuse Prevention Act"). This language is "so mandatory that it creates a right to

rely on that language thereby creating an entitlement that could not be withdrawn without due process." *Cosco v. Uphoff*, 195 F.3d 1221, 1223 (10th Cir. 1999), *cert. denied*, 121 S.Ct. 784, 148 L.Ed. 2d 680 (2001). "The *mandatory* nature of the regulation is the key, as a Plaintiff 'must have a legitimate claim of entitlement to the interest, not simply a unilateral expectation of it.'" *Washington v. Starke*, 855 F.2d 346, 349 (6th Cir. 1988) (emphasis in original) (quoting *Bills v. Henderson*, 631 F.2d 1287, 1292 (6th Cir. 1980)).

There can be no question that the restraining order here mandated the arrest of Mr. Gonzales under specified circumstances, or at a minimum required the use of reasonable means to enforce the order. Those circumstances were defined by the restraining order which told the police what its objective terms were and commanded that an arrest occur upon an officer's probable cause determination that the order was being violated and that Mr. Gonzales had notice of the order. The restraining order here specifically directed, with only the narrowest of exceptions, that Mr. Gonzales stay away from Ms. Gonzales and her daughters. Thus, the restraining order provided objective predicates which, when present, mandated enforcement of its terms.

III. THE PROCESS DUE RESPONDENT IS SIMPLE AND PRACTICAL.

In addressing the question of what process was due to Ms. Gonzales, the Tenth Circuit applied the long-standing balancing test required by *Mathews v. Eldridge*, 424 U.S. 319 (1976). Castle Rock makes a generalized claim that the Tenth Circuit failed to provide any guidance as to the

kind of process due and has imposed upon the district courts the burden of designing procedures. This simply is not the case. The Tenth Circuit applied the *Mathews* analysis to the particular facts of this matter, and expressly held that Ms. Gonzales was entitled to the following process:

> The statute directs police officers to determine whether a valid order exists, whether probable cause exists that the restrained party is violating the order, and whether probable cause exists that the restrained party has notice of the order. If, after completing these three basic steps, an officer finds the restraining order does not qualify for mandatory enforcement, the person claiming the right should be notified of the officer's decision and the reason for it.

PA at 40a (citations and footnotes omitted). The Tenth Circuit provided Castle Rock and other municipalities in Colorado with a specific process to follow when presented with an alleged restraining order violation.

The identified procedure does not amount to a substantial burden upon the interests of police departments and municipalities. Indeed, the process would only take minutes to perform, and includes tasks officers regularly perform in the course of their daily duties. Under the balancing test required by *Mathews*, and reading the allegations of Ms. Gonzales' complaint in the light most favorable to her, the scales tip in her favor. Ms. Gonzales' interest in having the restraining order enforced was substantial, and without question the officers' alleged failure to provide her with any meaningful process prior to refusing to enforce the court order erroneously deprived her of her protected entitlement. Moreover, the use of

additional safeguards would have certainly aided in preventing the risk of wrongful deprivation. Finally, requiring the officers to engage in this three-step process prior to depriving an individual of her enforcement rights is hardly an unreasonable burden to place on the police.

Castle Rock implies that Ms. Gonzales did receive some form of a hearing from the officers and hence her complaint cannot be construed as challenging the lack of process she received, but, instead, is a challenge to the results of that hearing. Ms. Gonzales' repeated phone calls to the police department and the officers' seemingly outright dismissal of her claims in no way constitutes "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews,* 424 U.S. at 333. According to Ms. Gonzales' complaint, in effect no one was listening.

It is apparent that the restraining order enforcement statute provides direction in answering the question of what additional procedural safeguards could have been employed by the police officers. *See* Colo. Rev. Stat. § 18-6-803.5. The statute guides officers as to the process they should provide a holder of a restraining order before depriving that individual of his or her enforcement rights. By completing the three steps laid out in the statute, the wrongful denial of Ms. Gonzales' right could have been prevented, and three lives potentially spared.

IV. THE TENTH CIRCUIT'S HOLDING IS NARROWLY TAILORED AND OF LIMITED APPLICABILITY TO OTHER FACT PATTERNS.

In its Opening Brief, Castle Rock loses sight of the issue actually decided by the Tenth Circuit. The Tenth Circuit's opinion emphasized at length the fact that, in

reaching its conclusion that Ms. Gonzales had a protected interest in enforcement of the order which was cognizable under *Roth*, it was relying on the specific language in the restraining order itself, *coupled with* certain statutory language regarding mandatory enforcement of the order. PA at 16a-29a. The Tenth Circuit *never* held that the statutory language mandating enforcement of the restraining order in and of itself created any protected property interest. In fact, the Tenth Circuit stated just the opposite:

> In this case, the Colorado statute alone does *not* create the property interest. Rather, the court-issued restraining order, which specifically dictated that its terms must be enforced, *and* the state statute commanding the same, establish the basis for Ms. Gonzales' procedural due process claim.

PA at 12a, n.5 (emphasis added).

This point was emphasized recently by the Tenth Circuit in *Jennings v. City of Stillwater,* 383 F.3d 1199 (10th Cir. 2004). In *Jennings,* the plaintiff asserted a violation of her procedural due process rights, arguing that an Oklahoma statute created a constitutionally-protected property interest in "not being discouraged from prosecuting" a sexual assault claim. *Jennings,* 383 F.3d at 1206. Writing for a unanimous panel, Judge McConnell (who dissented in the case at bar and was joined in *Jennings* by Judge Kelly, who also dissented in the present case) stated:

> Relying on the panel opinion in *Gonzales v. City of Castle Rock,* 307 F.3d 1258, 1264 (10th Cir.2002), Plaintiff argues that when regulatory language in a statute "is so mandatory that it

creates a right to rely on that language," an entitlement is created that "[cannot] be withdrawn without due process." *Id., quoting Cosco v. Uphoff,* 195 F.3d 1221, 1223 (10th Cir. 1999) (per curiam). Plaintiff argues that Okla. Stat. tit. 22, § 40.3(A) entitles her not to be discouraged from prosecuting the offenders, and that Detective Buzzard deprived her of this right.

Whatever the force of this argument under our *Gonzales* holding as it existed at the time Plaintiff filed her appeal, it is foreclosed by our subsequent en banc opinion, issued just before this case was argued. *See Gonzales v. City of Castle Rock,* 366 F.3d 1093 (10th Cir. 2004) (en banc) [hereinafter *Gonzales II*]. In *Gonzales II* we analyzed due process claims brought against local police officers who failed to enforce a court-issued restraining order. Both the restraining order and the relevant state statute contained language that required police to arrest restrained persons who were in violation of the order. The statute provided: "A peace officer shall arrest, or, if arrest is impractical . . . seek a warrant for the arrest of the restrained person." *Gonzales II,* 366 F.3d at 1097, 1104. While the original panel opinion left open the possibility that the mandatory statutory language, standing alone, could create an interest enforceable through the due process clause, that position was rejected by the en banc Court. The en banc Court characterized Ms. Gonzales' property interest as the product of a court-issued restraining order, coupled with statutory language requiring enforcement. *See id.* at 1101-05. The Court disclaimed the theory Plaintiff now urges:

> In this context, many of the cases cite[d in the] dissent are inapposite to the specific facts and legal arguments raised in the present case because the courts in those cases rejected the argument that statutes detailing procedures regarding general child abuse investigations and reporting could *alone* create a protected interest in such services. [citing cases] In this case, *the [state] statute alone does not create the property interest.* Rather, the court-issued restraining order, which specifically dictated that its terms must be enforced, and the state statute commanding the same, establish the basis for Ms. Gonzales' procedural due process claim.

Id. at 1101 n.5 (emphasis added).

Similarly, after addressing the state's statutory regime, the Court dropped a footnote stating:

> While we asked the parties to brief whether a protected property interest was created by the mandatory terms and objective predicates laid out in [the state statutes], we do not so hold. Rather, we conclude that the statute's force derives from the existence of a restraining order issued by a court on behalf of a particular person and directed at specific individuals and the police.

Id. at 1104 n. 9.

> Here, unlike *Gonzales II,* Plaintiff's asserted property interest rests solely on the language of the Oklahoma statute. There was no court order specifically applying the protections of the statute to her. The procedural due process claim can thus not be maintained.

Id.

In this regard, the Tenth Circuit's opinion in the present matter must be read as reflecting a very narrow, fact-specific issue. In fact, *Jennings* is the *sole* reported decision to date which addresses or relies upon, in any way, the Tenth Circuit's holding in the present case. Despite Castle Rock's urgings to the contrary, it does not appear that the sky is falling after all.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the decision of the Tenth Circuit Court of Appeals and remand this case for further proceedings below.

Respectfully submitted,

BRIAN J. REICHEL
Counsel of Record
LAW OFFICE OF BRIAN J. REICHEL
5023 West 120th Avenue, #326
Broomfield, CO 80020
303-465-9034

DAVID T. ODOM
ODOM & ASSOCIATES, P.C.
24724 Royal Lytham
Naperville, IL 60564

Counsel for Respondent

(19)

No. 04-278

IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHERYN GONZALES, AND LESLIE GONZALES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

THOMAS S. RICE
ERIC M. ZIPORIN
Counsel of Record
Senter Goldfarb & Rice, L.L.C.
1700 Broadway, Suite 1700
Denver, Colorado 80290
(303) 320-0509

JOHN C. EASTMAN
c/o Chapman University
School of Law
One University Drive
Orange, CA 92866

ERIK S. JAFFE
Erik S. Jaffe, P.C.
5101 34th Street, NW
Washington D.C. 20008

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. Respondent Concedes that *DeShaney* Is Not at Issue, But Presses a Substantive Rather Than Procedural Due Process Argument Nonetheless. 1

II. Even if Colorado Mandates Enforcement, It Has Not Thereby Created a *Roth*-Type Property Interest. 4

A. Without a Fixed Mandate for a "Specific Benefit," There Is No Property Interest. 6

B. Respondent and Her *Amici* Completely Ignore This Court's Holdings in *Sandin* and *Olim*. 8

C. This Court Has Declined to Recognize a Judicially Cognizable Interest in the Arrest of Another 10

D. Colorado's Own Actions Belie the Claim that It Intended to Create a "Drop Everything" Property Interest in Police Protection. 12

1. Respondent's *Amici* Mischaracterize the Restraining Order as a "Protection Order," and Rely on a Legislative Finding Made Five Years *After* the Events at Issue Here. 12

2. Colorado Classifies the Crime of Violating a Restraining Order as a Relatively Minor Class 2 Misdemeanor, and Bars Tort Remedies for Non-Willful and Wanton Conduct. 17

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Bishop v. *Wood*, 426 U.S. 341 (1976) 17

Board of Regents of State Colleges v. *Roth*, 408 U.S. 564 (1972) 1, 4, 5, 8

Carey v. *Piphus*, 435 U.S. 247 (1978) 4

City of Chicago v. *Morales*, 527 U.S. 41 (1999) 8

County of Sacramento v. *Lewis*, 523 U.S. 833 (1998) 2, 4

Daniels v. *Williams*, 474 U.S. 527 (1986) 19

DeShaney v. *Winnebago Cty. Dept. of Soc. Servs.*, 489 U.S. 189 (1989) 1, 2, 3, 11

Doe by Nelson v. *Milwaukee County*, 903 F.2d 499 (CA7 1990) 9

Edwards v. *Balisok*, 520 U.S. 641 (1997) 4

Goldberg v. *Kelly*, 397 U.S. 254 (1970) 7

Hewitt v. *Helms*, 459 U.S. 460 (1983) 9

Illinois v. *Gates*, 462 U.S. 213 (1983) 7

Inmates of Attica Correctional Facility v. *Rockefeller*, 477 F.2d 375 (CA2 1973) 10, 11, 16, 19

Kamen v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90 (1991) 17

Leeke v. *Timmerman*,
454 U.S. 83 (1981) 10

Linda R.S. v. *Richard D.*,
410 U.S. 614 (1973) 10

Logan v. *Zimmerman Brush Co.*,
455 U.S. 422 (1982) 7

Maryland v. Pringle,
540 U.S. 366 (2003) 7

Mathews v. *Eldridge*,
424 U.S. 319 (1976) 7

Matsushita Elec. Industrial Co. v. *Zenith Radio Co.*,
475 U.S. 574 (1986) 17

Memphis Light, Gas & Water Div. v. *Craft*,
436 U.S. 1 (1978) 7

Olim v. *Wakinekona*,
461 U.S. 238 (1983) 8, 9

Ornelas v. *United States*,
517 U.S. 690 (1996) 7

Paul v. *Davis*,
424 U.S. 693 (1976) 19

People v. *Hauseman*,
900 P.2d 74 (Colo. 1995) 8

Ruegsegger v. *Jefferson Cty. Bd. of Cty. Comm'rs*,
197 F.Supp.2d 1247 (D. Colo. 2001) 19

Sandin v. *Conner*,
515 U.S. 472 (1995) 5, 8, 9

Sibron v. *New York*,
392 U.S. 40 (1968) 19

Simon v. *Eastern Ky. Welfare Rights Org.*,
426 U.S. 26 (1976) 10

Smith v. *State Comp. Ins. Fund*,
749 P.2d 462 (Colo. App. 1987) 20

State v. *Addison*,
2 S.C. 356 (1871) 10

United Parcel Service, Inc. v. *Mitchell*,
451 U.S. 56 (1981) 1

Youakim v. *Miller*,
425 U.S. 231 (1976) 17

Statutes and Constitutional Provisions

28 U.S.C. § 547(1) 12

33 U.S.C. § 413 12

42 U.S.C. § 1983 17

42 U.S.C. § 1987 ..... 11, 12

42 U.S.C. § 1990 16

C.R.S. § 1-2-225 18

C.R.S. § 1-13-109 18

C.R.S. § 1-13-709 18

C.R.S. § 6-1-305 18

C.R.S. § 6-16-111(1)(e) 18

C.R.S. § 12-6-121 18

C.R.S. § 12-8-127 18

C.R.S. § 12-9-114 18

C.R.S. § 12-10-110 18

C.R.S. 13-14-101(2.4), *added by* 2003 Colo. Laws, Ch. 139, § 1 (H.B. 03-1117) (effective July 1, 2003) 16

C.R.S. § 13-14-102 (effective July 1, 1999) 14

C.R.S. 13-14-102(1), added by Colo. Laws 2004, Ch. 178, § 2 (effective July 1, 2004) 16

C.R.S. § 14-4-102 (*repealed* July 1, 1999) 14

C.R.S. § 14-10-108(2.5) 14

C.R.S. § 14-10-108(a) (1999) 13
C.R.S. § 14-10-108(b) 13
C.R.S. § 14-10-108(c) 13
C.R.S. § 18-1-104(2) 18
C.R.S. § 18-1.3-401 18
C.R.S. § 18-1.3-501 18
C.R.S. § 18-3-402 18
C.R.S. § 18-6-803(d) 19
C.R.S. § 18-6-803.5(3) 1
C.R.S. § 18-6-803.5(5) 19
C.R.S. § 24-10-118(2)(a) 19
U.S. Const. amend. XIV, § 1 (Due Process Clause) .... passim

Other Authorities

Opinion of South Carolina Attorney General, 2002 WL 1340433 (May 21, 2002) 7

ARGUMENT

I. Respondent Concedes that *DeShaney* Is Not at Issue, But Presses a Substantive Rather Than Procedural Due Process Argument Nonetheless.

Respondent correctly acknowledges that "[t]his Court is *not* being asked" to revisit *DeShaney* v. *Winnebago Cty. Dept. of Soc. Servs.*, 489 U.S. 189 (1989). Resp. Br., at 9 (emphasis added); *see also* Brief of *amici curiae* Nat'l Black Police Ass'n, *et al.* ("NBPA Br."), at 2 ("Respondent does not seek to relitigate *DeShaney*").[1] Nevertheless, Respondent repeatedly appears to challenge the substantive outcome rather than merely the procedures that Castle Rock afforded. As Judge McConnell noted in his dissenting opinion below, that is a *DeShaney* challenge, not one under *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972), and it is hard to square with Respondent's concession that this Court is not being asked to overrule *DeShaney*, or with the failure to preserve any such challenge in the court below, *see* Petr's Opening Br., at 9-10 n.4.

At page 25, for example, Respondent claims that Section 18-6-803.5(3) of Colorado's Revised Statutes imposed on Castle Rock a duty "to enforce the restraining order" and that "Castle Rock's failure to perform adequately its statutory duties in this regard constituted a denial of [her] procedural due process." Similarly, at page 31, Respondent contends that "Castle Rock was required . . . to perform the non-discretionary, ministerial task of using 'every reasonable means' to enforce the restraining order, and that its "failure

---

[1] Some of Respondent's *amici* apparently seek to re-litigate *DeShaney*. *See* Brief of *amici curiae* ACLU, *et al.* ("ACLU Br."), at 8-9. Their efforts run afoul of the general rule that an amicus cannot expand the questions presented to this Court. *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981).

to follow this legislative and court mandate denied Ms. Gonzales and her three daughters their fundamental due process rights." In other words, Respondent is complaining that the police failed to enforce the restraining order—a substantive claim—not that the police failed to give her process before failing to enforce. *See also* NBPA Br., at 4 ("Respondent believes that her pleas for enforcement should have been heeded . . . . But at base she claims that Petitioner ignored her requests for assistance"); Brief of *amici curiae* Nat'l Network to End Domestic Violence, *et al.* ("NNEDV Br."), at 21 (describing the police failure here as a "failure to enforce," not a failure to afford process before failing to enforce); Brief of *amici curiae* Family Violence Prevention Fund, *et al.* ("FVPF Br."), at 5 ("failure to enforce . . . was a violation . . . of procedural due process"). The only "process" that would meet her objection is a different substantive outcome.

Respondent's argument to the contrary, at page 13, fundamentally misconstrues the distinction between procedural and substantive claims drawn in *County of Sacramento* v. *Lewis*, 523 U.S. 833 (1998). This Court noted in *Lewis* that a procedural due process claim is based on "a denial of fundamental procedural fairness," while a substantive claim is based on the "exercise of power without any reasonable justification in the service of a legitimate governmental objective" (or, assuming that police *inaction* can properly be characterized as an "exercise of power," the failure to exercise power without any reasonable justification). *Id.*, at 845-46. While Respondent apparently recognizes that any claim that "Castle Rock's denial of her enforcement rights arose out of unjustified governmental action" would be a substantive claim foreclosed by *DeShaney*, she contends instead "that it was *procedurally unfair* for the Castle Rock police arbitrarily to decline to perform duties required of them . . . ." Resp. Br. at 13 (emphasis added); *see also* NBPA Br., at 19 ("Petitioner merely 'repeatedly ignored and refused her requests

for enforcement'"). Yet in both iterations, the claim is that the police action (or, more correctly, *inaction*) was arbitrary and unjustified—a substantive claim. Simply adding the words "procedurally unfair" to the latter formulation does not alter the substantive nature of the claim.

The scant two pages of Respondent's brief actually devoted to "process" makes this abundantly clear. *See* Resp. Br., at 32-34. Respondent concedes that she made "repeated phone calls to the police department." Resp. Br., at 34. She acknowledged in her complaint that Officers Brink and Ruisi were dispatched to her home in response to her first call at approximately 7:30 p.m. Complaint ¶¶11-12, PA 126a. She alleges that she showed the officers the restraining order and requested, albeit unsuccessfully, that it be enforced. *Id.*, ¶ 12. By her own allegations, she even admits that Officers Brink and Ruisi responded to her request, informing her that "there was nothing they could do about the TRO." *Id.* She contends in her complaint that she again spoke with Officer Brink during a phone call at approximately 8:30 p.m. and asked him to put out an APB for Mr. Gonzales, and she again admits by her own allegations that Officer Brink responded to her request by "refus[ing]" it, telling her instead to wait until 10:00 p.m. *Id.*, ¶ 13. She acknowledges that she spoke again with the Castle Rock police dispatcher at approximately 10:10 p.m. and again at midnight, and then gave an incident report to Officer Ahlfinger at approximately 12:50 a.m. Despite these multiple "hearings" pressing her requests to the police, and despite the multiple police responses, Respondent claims that "in effect no one was listening" because the enforcement action she requested was not taken. Resp. Br., at 34. Again, that is a complaint about the substantive outcome, not about the process, and it is foreclosed by *DeShaney*.[2]

---

[2] Even if, despite *DeShaney* and despite Respondent's failure to preserve the *DeShaney* substantive due process claim below, this Court were to

This Court has previously noted that a procedural due process claim pertains only to the process afforded, not to the outcome of that process. *See, e.g., Edwards* v. *Balisok*, 520 U.S. 641, 645 (1997) (citing *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978)). Even erroneous decisions made after an appropriate hearing simply do not offend *procedural* due process. To the extent any *process* was required, *but see infra*, Part II, it was provided. *See, e.g.*, Resp. Br., at 33 (quoting *en banc* decision below, PA 40a) (noting that if, after completing probable cause determination, "an officer finds the restraining order does not qualify for mandatory enforcement, the person claiming the right should be notified of the officer's decision and the reason for it"); NBPA Br., at 21 (same); Brief of *amici curiae* Nat'l Ass'n of Women Lawyers, *et al.* ("NAWL Br."), at 9 ("police need provide *only an informal 'hearing'* to the complainant in order to determine whether probable cause exists that a violation has occurred") (emphasis added).

II. Even if Colorado Mandates Enforcement, It Has Not Thereby Created a *Roth*-Type Property Interest.

For the reasons set forth in Petitioner's Opening Brief, the Colorado statute establishing procedures for enforcing violations of restraining orders does not mandate a particular result, even if those procedures are summarized on the restraining order itself. Thus, the statute (even when combined with the restraining order) does not create a *Roth*-type property interest. But even if a particular result—arrest—is deemed to be mandated, this Court confirmed in *Sandin* v. *Conner*, 515 U.S. 472 (1995), that a State may establish mandatory procedures without creating a property right to those procedures. Respondent does not even mention, much less explain away, this Court's holding in *Sandin*. Additionally (as noted by the Department of Justice in its *amicus curiae* brief), this Court has recognized that private citizens do not have a property interest in the arrest of another, yet Respondent is silent on that point, too. Finally, even if this Court were to reverse course and recognize that a State might create a property-right entitlement to the arrest of another, Colorado has clearly not done so here. The underlying crime of violation of a restraining order is only a class 2 misdemeanor, and Colorado law immunizes police from tort liability for any but willful and wanton conduct—hardly the stuff of a *Roth*-type property interest. Upholding the prospect of constitutional liability found by the Tenth Circuit below would therefore fundamentally alter rather than affirm the considered policy judgment of the State.[3]

consider whether Castle Rock's failure to enforce the restraining order so "shocked the conscience" as to violate substantive due process, this Court in *Lewis* rejected, in the context of police *action*, mere deliberate indifference as sufficient for constitutional liability outside the custodial prison context. 523 U.S., at 852. A "purpose to cause harm," or action taken "maliciously and sadistically for the very purpose of causing harm," is required. *Id.*, at 853-54. The standard should be at least as high for police *inaction*. None of the allegations in the complaint come close to the malicious purpose standard required by *Lewis*.

[3] Respondent seeks to minimize the implications of her position by claiming that it would only apply to statutory entitlements coupled with individual restraining orders. Every case cited by Respondent for the proposition that the state can create non-traditional property interests in services was in the context of a state statute standing alone, and had nothing to do with individualized court orders. See Resp. Br., at 14. In this case, the restraining order adds nothing to the supposed "creation" of a property right, but rather is merely the factual trigger that makes the *statute* applicable, no different, *e.g.*, than a report of child abuse that triggers statutory protection procedures. Despite Respondent's protests to the contrary, her theory would spawn a plethora of "property" rights and constitutional claims from even the most ordinary state statutes that seek to provide law enforcement or social services guidance, causing federal court intrusion into vast swaths of traditional state activities.

A. Without a Fixed Mandate for a "Specific Benefit," There Is No Property Interest.

Respondent remains unclear as to just what it is that the statute (together with the restraining order) at issue here mandates. At times, she seems to argue that she has a property right in a particular means of enforcement—the police must arrest or seek a warrant for an arrest if arrest is impractical under the circumstances. Resp. Br., at 19, 23.[4] She subsequently concedes, though, that "there may be instances where the mandatory duty of enforcing a restraining order could be accomplished through means other than arrest," and she even concedes that no enforcement would be required for a "technical violation" of the restraining order, such as "when the restrained individual is found standing 99 yards away from the family home when the restraining order requires him to remain at least 100 yards away." Resp. Br., at 26, 28; *see also* NBPA Br., at 8 ("'Enforcement,' as used in the Colorado statute, *may* include arrest, and often must. But it may alternatively or additionally include obtaining a warrant or securing children") (emphasis added).[5]

Moreover, the alternative arrest/warrant-for-arrest options are conditioned on a finding of probable cause, a concept that this Court has studiously declined to define with any precision. *See, e.g.*, *Maryland v. Pringle*, 540 U.S. 366,

[4] Even the distinction between arrest and seeking a warrant for arrest undercuts the claim of specific benefit. As former Colorado Representative Peggy Kerns, sponsor of the 1994 statutory amendments at issue here and one of Respondent's *amici*, noted, arrest was not mandated when impractical, such as "when the person who violated the order is not to be found at the scene"—the very circumstances presented here. Brief of *amici curiae* Peggy Kerns, *et al.* ("Kerns Br."), at 9.

[5] Some of Respondent's *amici* disagree on this point. *See* NNEDV Br., at 29 (contending that arrest is even mandated if the restrained party steps even a foot inside a 100-foot distance ban); Brief of *amici curiae* Nat'l Coalition Against Domestic Violence, *et al.* ("NCADV Br."), at 3-4 ("statute . . . required the responding officers to arrest Mr. Gonzales").

371 (2003) ("The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances"); *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996) ("Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible. They are commonsense, nontechnical conceptions") (*quoting Illinois* v. *Gates*, 462 U.S. 213, 231 (1983)); *see also* Opinion of South Carolina Atty. Gen., 2002 WL 1340433 (May 21, 2002) ("It is our opinion that a police officer possess (sic) broad discretion under this ["must arrest"] statute" in "determining whether to arrest" because of the probable cause condition).

Elsewhere, Respondent claims that Colorado created "a protected interest in the *enforcement* of restraining orders," apparently contending that the statutory mandate at least requires *some* kind of enforcement within the panoply of options available to police. Resp. Br., at 21 (emphasis added); *compare* NBPA Br., at 8 (arguing that the statute requires "*every* reasonable means" of enforcement). Still elsewhere, Respondent contends that the "statute imposes a mandatory, affirmative duty on the part of police officers to *protect* persons who have a valid restraining order," Resp. Br. at 25 (emphasis added), thereby shifting the focus from enforcement (whether by arrest or otherwise) *after* violation to intercession *before* violation. It may certainly be possible for Colorado to create an entitlement to 24-hour-a-day protective services, which would at least bear some resemblance to the kind of interests this Court has previously recognized as property. *See* Resp. Br., at 14 (*citing, e.g.*, *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 11-12 (1978); *Mathews* v. *Eldridge*, 424 U.S. 319 (1976); *Goldberg* v. *Kelly*, 397 U.S. 254, 262 (1970)); ACLU Br., at 10; NBPA Br., at 5. But there is nothing in the statutory scheme at issue here to suggest that Colorado sought to take that step and, outside of the decision below and the two district court

opinions on which it relied, we are unaware of *any* comparable application of *Roth*.

With so many possible permutations of just what the statute specifies that police "shall" do, it is hard to define with any specificity, much less the specificity required by *Roth*, just what the precise "specific benefit" is that Ms. Gonzales believes she has been given. *Roth*, 408 U.S., at 577. Neither the Colorado statute, nor the restraining order, mandates a particular result.

The background principles against which this statute, or any statute specifying police duties, must be read bolsters the point. In *City of Chicago* v. *Morales*, 527 U.S. 41, 47 n.2 (1999), this Court addressed a Chicago ordinance that specified that a police officer "*shall* order all [loitering gang members] to disperse and remove themselves from the area." In holding that police had an unconstitutional amount of discretion to decide whether to enforce the statute, and against whom, Justice Stevens noted: "It is possible to read the mandatory language of the ordinance to conclude that it affords the police no discretion, since it speaks with the mandatory 'shall.' However, not even the city makes this argument, which flies in the face of common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances." *Id.*, at 62 n.32. As noted in our opening brief, Colorado follows the same common-sense background principle. *See, e.g.*, *People* v. *Hauseman*, 900 P.2d 74, 78 (Colo. 1995). Yet that traditional discretion undermines any claim of entitlement to a "specific benefit" here.

B. Respondent and Her *Amici* Completely Ignore This Court's Holdings in *Sandin* and *Olim*.

More fundamentally, even if the statute and restraining order combined to mandate a certain police response, Respondent and her *amici* have completely ignored this Court's decisions in *Sandin* and *Olim* v. *Wakinekona*, 461 U.S. 238

(1983), holding that procedural mandates do not create substantive entitlements. "The State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, . . . but in making that choice the State does not create an independent substantive right." *Olim*, 461 U.S., at 251; *see also Doe by Nelson* v. *Milwaukee County*, 903 F.2d 499, 503 (CA7 1990) (describing similar "mandatory" statutory language as "a set of procedures that guides [police] in their efforts to prevent" domestic violence). In *Sandin*, this Court recognized that States "codify prison management procedures in the interest of uniform treatment," adding that "[s]uch guidelines are not set forth solely to benefit the prisoner. They also aspire to instruct subordinate employees how to exercise discretion." 515 U.S., at 482. The Court then overruled *Hewitt* v. *Helms*, 459 U.S. 460 (1983), and its methodology of finding liberty interests from mandatory language because the *Hewitt* approach created a disincentive for States to confine discretionary authority by use of such procedural mandates, lest they be found to have created a constitutionally-protected property interest in the procedures. *Id.*

Although Petitioner argued in its opening brief that *Sandin* was "all but dispositive," Respondent does not even cite, much less come to grips with, either *Sandin* or *Olim*, or with the sensible recognition that a State may "mandate" certain conduct by its employees without thereby creating a property interest.[6] Indeed, Respondent herself notes that the Legislature's purpose in enacting the statute was "to provide

---

[6] Likewise, none of Respondent's *amici* address the holdings in *Sandin* and *Olim* that a State can "mandate" certain procedures for its employees without thereby creating a constitutionally-protected interest in those procedures. Only one of the nine *amici* in support of Respondent even mentions *Sandin* and only two cite *Olim*, and none of the briefs address the holdings discussed above. *See* NBPA Br., at 7, 15 n.8; FVPF Br., at 20-21.

guidance to law enforcement." Resp. Br., at 20 (emphasis added); *see also* NBPA Br., at 7; *id.*, at 27-29; Kerns Br., at 11. This is just what one would expect from a State intent on giving direction to its police offices, but completely at odds with the claim of entitlement advanced by Respondent.

C. This Court Has Declined to Recognize a Judicially Cognizable Interest in the Arrest of Another.

The Department of Justice rightly points out in its *amicus* brief that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." DOJ Br. at 18 (quoting *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973)). Although *Linda R.S.* dealt with "prosecution," this Court applied its holding to "arrests" in *Leeke* v. *Timmerman*, 454 U.S. 83, 86 (1981). Plaintiffs in *Leeke* were state prison inmates who sued state officials for conspiring to prevent the arrest of a prison guard who had allegedly beaten the inmates unnecessarily during a prison uprising. *Leeke* involved the quintessential "special relationship" of a prison setting, yet even there this Court recognized that private citizens do not have a judicially cognizable interest in the arrest of another. *Id.*, at 87 n.2 (citing *State* v. *Addison*, 2 S.C. 356, 364 (1871), for the proposition that "[s]ave for the just and proper vindication of the law, no one has an interest in the conviction of [another]"). *See also Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 37 (1976) (adhering to "the settled doctrine that the exercise of prosecutorial discretion cannot be challenged by one who is himself neither prosecuted nor threatened with prosecution").

The Second Circuit's decision in *Inmates of Attica Correctional Facility* v. *Rockefeller*, 477 F.2d 375 (CA2 1973), is particularly instructive. Plaintiffs in the case were inmates of the state prison in Attica, New York, at the time of highly publicized riots at the prison in which 32 inmates were killed as prison officials regained control of the prison. The inmates contended, not implausibly, that prior to, during, and

after the riots, some prison guards had violated their civil and constitutional rights, and they tried to have the U.S. Attorney for the region investigate and, where warranted, arrest and prosecute the guards. Despite a federal law that specifically "authorized *and required*" the U.S. Attorney "to institute prosecutions against all persons violating" the particular laws at issue, *see* 42 U.S.C. § 1987, no arrests were made and the inmates filed suit to compel the U.S. Attorney to comply with the federal mandate. The inmates pressed an argument about their standing to demand arrest of the guards very similar to the argument advanced by Respondent's *amici* here, namely, that failure to arrest would only encourage more violence against the inmates. *See Attica*, 477 F.2d, at 378; *see also* ACLU Br., at 17; NNEDV Br., at 3, 16, 25; NCADV Br., at 13; Kerns Br., at 4.[7] Nevertheless, the Second Circuit affirmed the district court's refusal to issue a mandamus compelling the U.S. Attorney "to investigate, arrest, and prosecute" the prison guards, holding that the issuance of a mandamus would contravene the "traditional judicial aversion to compelling prosecutions" and impermissibly intrude upon executive discretion, in violation of the separation of powers doctrine. *Attica*, 477 F.2d, at 379-80. The court noted that "federal courts have traditionally and, to our knowledge, uniformly refrained from overturning, at the instance of a private person, discretionary decisions of federal prosecuting authorities not to prosecute persons regarding whom a complaint of criminal conduct is made." *Id.*, at 378 (citing cases).

The Second Circuit also expressly rejected the identical argument pressed by Respondent and her *amici* here,

---

[7] The further claim that the issuance of the restraining order was a "state-created danger" because it lulled Ms. Gonzales into not taking steps to protect herself, *e.g.*, ACLU Br., at 20-21, was rejected by this Court in *DeShaney*, 489 U.S., at 197-201, where the claim was much stronger than it is here, *see id.*, at 208-10 (Brennan, J., dissenting).

namely, that the federal statute's use of mandatory language withdrew normal prosecutorial discretion, holding that "[t]he mandatory nature of the word 'required' as it appears in § 1987 is insufficient to evince a broad Congressional purpose to bar the exercise of executive discretion in the prosecution of federal civil rights crimes." *Id.*, at 381. The court noted that "[s]imilar mandatory language is contained in the general direction in 28 U.S.C. § 547(1) ("each United States attorney, . . . *shall*-(1) prosecute for all offenses against the United States; . . ." (emphasis supplied)) and in other statutes in particular areas of concern, *e. g.*, 33 U.S.C. § 413 ("it shall be the duty of United States attorneys to vigorously prosecute all offenders" of certain provisions of the Rivers and Harbors Act when requested to do so by the appropriate officials)," yet it recognized that "[s]uch language has never been thought to preclude the exercise of prosecutorial discretion." *Id.*

D. Colorado's Own Actions Belie the Claim that It Intended to Create a "Drop Everything" Property Interest in Police Protection.

Even assuming that Colorado could ever create a property right to a "drop everything" enforcement, by arrest, of a restraining order, it has not done so here. Respondent's *amici* mischaracterize the order at issue here as mandating protection from a "batterer" or "abuser." *See, e.g.*, FVPF Br., at 11-12, 18. No findings of abuse were ever made, and Respondent makes no such allegation. Moreover, the crime of violating a restraining order is a relatively minor class 2 misdemeanor, and Colorado does not permit a tort remedy for non-willful and wanton police failures to enforce. Neither action is consistent with the claim of entitlement advanced by Respondent and accepted by the court below.

1. Respondent's *Amici* Mischaracterize the Restraining Order as a "Protection Order," and Rely on a Legislative Finding Made Five Years *After* the Events at Issue Here.

A number of Respondent's *amici* erroneously describe the order at issue in this case as a "protection order" rather than a "restraining order," apparently trying to bolster the argument that Ms. Gonzales had an entitlement to police *protection* rather than to an injunction restraining Mr. Gonzales. *See, e.g.*, NNEDV Br., at 22-25; NCADV Br., at 5; Kerns Br., at 10, 16-17; Brief of *amicus curiae* AARP, at 7-8. Several of the *amici* also contend that the Colorado legislature has made enforcement of protection orders—impliedly such as that issued to Ms. Gonzales—a "high priority" "of paramount importance." *See, e.g.*, Kerns Br., at 3, 11-12. Those arguments are based on amendments to the Colorado statutory scheme made *after* the events at issue in this case, and on findings of domestic abuse that were not made or even alleged here.

Colorado law at the time of the events giving rise to this litigation actually provided for several kinds of restraining orders. One statute authorized the issuance of restraining orders incident to a dissolution of marriage, preventing a party to the dissolution from concealing or disposing of marital property or from "molesting or disturbing the peace of spouse and children." C.R.S. § 14-10-108(a), (b) (1999) (the "Dissolution Orders Statute"). No finding of past, present, or future dangerousness was required for an order to be issued under either of these provisions.[8]

---

[8] The statute also authorizes exclusion from the family home based upon a finding that either physical or emotional harm would otherwise result. C.R.S. § 14-10-108(c); PA 89a. Respondent's selective quotation of the statute, at page 20, erroneously conveys the impression that the "physical or emotional harm" showing required for an exclusion-from-the-family-home order also applies to the injunction against molesting and disturbing the peace. It does not.

A separate Colorado statute authorized the issuance of "restraining orders to prevent domestic abuse" by a person who "has committed acts constituting domestic abuse." C.R.S. § 14-4-102 (*repealed* July 1, 1999) (the "Domestic Abuse Statute").[9] Additionally, C.R.S. § 14-10-108(2.5) (the "Child Custody Provision"), added to the Dissolution Orders Statute in 1994 (and subsequently repealed in 2004), authorized the award of interim legal custody of a child when "reasonably related to preventing domestic abuse . . . or preventing the child from witnessing domestic abuse."

Significantly, the orders at issue in this case were issued pursuant to the Dissolution Orders Statute, not the Domestic Abuse Statute or the Child Custody Provision. *See* PA 89a. Neither the temporary order issued on May 21, 1999, nor the permanent order issued June 4, 1999, was based on a finding of "domestic abuse," as would have been required for a restraining order under the Domestic Abuse Statute, and the Child Custody Provision of the pre-printed injunction that was issued to Mr. Gonzales is lined through and thereby made inapplicable. *Id.*[10] Rather, Mr. Gonzales was enjoined from disposing of his property and from molesting or disturbing the peace of Ms. Gonzales and their children, as

[9] C.R.S. § 14-4-102 was replaced by C.R.S. § 13-14-102, upon which several of Respondent's *amici* rely. The new statute permits an *ex parte* "temporary civil restraining order" upon the finding that an "*imminent danger*" exists to the person seeking protection, and a permanent order if "the judge or magistrate is of the opinion that the defendant has committed acts constituting grounds for issuance of a civil protection order and that unless restrained will continue to commit such acts . . . ." C.R.S. §§ 13-14-102(1)(b), (4), (9)(a) (effective July 1, 1999) (emphasis added). No such findings were made or alleged here.

[10] The pre-printed order does announce a general finding of "irreparable injury" if the order was not issued, but that finding applied as much to the ban on property transfers as to the no-molest provision. There was no finding of domestic abuse. PA 89a.

permitted by the Dissolution Orders Statute. PA 89a.[11] He was not barred from having contact with the children, as might have been required had there been a finding of "domestic abuse" (if parenting time would have been allowed at all). Instead, he was specifically granted unsupervised parenting time.[12]

In other words, Respondent's *amici* aim their argument at the wrong statutory provision, based on findings of domestic abuse that were never made or alleged. *See, e.g.*, Kerns Br., at 16 (citing the wrong statute and erroneously claiming that a court already made "two essential findings" of prior violence and likelihood of future violence); ACLU Br., at 3 (claiming, without citation, that Mr. Gonzales "had a history of abusive and erratic behavior"); FVPF Br., at 18 (without citation, describing Mr. Gonzales as an "abuser"). Colorado did not adopt the terminology of "protection order" until 2003, and did not codify its view that issuance and enforcement of such orders were of "paramount importance" to the public policy of the State until July 1, 2004—four and five

[11] Although Mr. Gonzales was also barred from the family home, his substantial and unsupervised parenting rights make clear that the finding of "either physical or emotional harm" required for that part of the order addresses his interaction with Ms. Gonzales, not any concern about violence toward the children. PA 5a. In any event, because there is no allegation that Mr. Gonzales entered the family home, that part of the injunction is not at issue here.

[12] Respondent erroneously claims that the restraining order at issue here limited Mr. Gonzales's ability to have "contact" with Ms. Gonzales and their daughters. Resp. Br., at 5. Mr. Gonzales was excluded from the family home, and barred from "molesting" or "disturbing the peace" of Ms. Gonzales and their daughters, but he was not barred from having contact with the girls. Indeed, as Respondent later recognized, he was explicitly authorized to have unsupervised parenting time with his daughters every other weekend, for two weeks every summer, and—subject to the modest requirement that he notify Mrs. Gonzales first—for a midweek dinner visit—the very time when the killings took place. *See* Resp. Br., at 30; PA 5a.

years, respectively, after the events at issue here. *See* C.R.S. 13-14-101(2.4), *added by* 2003 Colo. Laws, Ch. 139, § 1 (H.B. 03-1117) (effective July 1, 2003); C.R.S. 13-14-102(1), added by Colo. Laws 2004, Ch. 178, § 2 (effective July 1, 2004).

Even if the statutory amendment adding the Legislature's view that the issuance and enforcement of protection orders are of "paramount importance" was just a "clarifying amendment," as some of Respondent's *amici* claim, NNEDV Br., at 7 n.5, the State clearly did not intend thereby to supplant its entire crimes classification scheme, elevating this relatively minor class 2 misdemeanor above felonies, for example. *See* Part II.D.2, *infra*. Nor does the amendment indicate, much less dispositively prove, that the State intended to create a property interest. Perhaps a statute specifically promising "protection" from the State (together with an order based on specific findings of prior acts of violence and likely future acts of violence), which expressly states it is creating an entitlement to such protection in its beneficiaries and which provides to those beneficiaries a remedy against the government or its officers for failures to protect, rather than an order simply "restraining" a private party, may one day be held to create a property interest, to which some procedural due process would attach. *See, e.g., Attica*, 477 F.2d, at 381 (suggesting that such a statute might create an entitlement); *consider* 42 U.S.C. § 1990 ("Every marshall . . . shall obey and execute all warrants and other process, when directed to him . . . [and if he] refuses or neglects to use all proper means diligently to execute the same, shall be liable to a fine . . . of $1,000, *for the benefit of the party aggrieved thereby*") (emphasis added). But that hypothetical statute, and the legislative determination that protection statutes are of "paramount importance," are not at issue here; the arguments grounded on them are therefore simply misplaced.

2. Colorado Classifies the Crime of Violating a Restraining Order as a Relatively Minor Class 2 Misdemeanor, and Bars Tort Remedies for Non-Willful and Wanton Conduct.

Respondent concedes that, "[f]or purposes of a § 1983 action, whether a property interest exists is dependent on state law." Resp. Br., at 18 (quoting *Bishop* v. *Wood*, 426 U.S. 341, 344 (1976)).[13] Perhaps the best evidence that Colorado did not intend to create a property interest in "drop everything" enforcement of restraining orders or in protection incident to them is the relatively minor sanction the Colorado law imposes on restraining order violations.

Colorado law provides that the crime of violating a restraining order is a Class 2 misdemeanor. There are eleven classes of crimes in Colorado—six classes of felonies, three classes of misdemeanor, and two classes of petty offenses.

---

[13] For this reason, the contention by Respondent's *amici* that there is an "evolved customary norm of international law that recognizes the right to protection from and compensation for domestic violence," is unavailing. Brief of *amici curiae* Internat'l Law Scholars, *et al.* ("ILS Br."), at 6. Because property interests are defined by state law rather than even by the federal Constitution, it seems implausible that they can be created, for purposes of U.S. constitutional law, by evolved international norms, particularly when such norms are derived from interpretations of treaties not ratified by the United States or where the United States has expressly disclaimed private causes of action. *See, e.g.*, ILS Br., at 11 n.14 (U.S. has not ratified CEDAW); *id.*, at 24 (Senate declaration that ICCPR is not self-executing). Moreover, even if such norms could create a protectable property interest, they have not done so. *See, e.g., id.*, at 10 (conceding that protection from domestic violence is not explicit in the ICCPR). In any event, the international law claim pressed by Respondent's *amici* is a new issue, not within the scope of the questions presented or addressed by the court below. It is therefore not properly before this Court. *See, e.g., Matsushita Elec. Industrial Co.* v. *Zenith Radio Co.*, 475 U.S. 574, 579 n.3 (1986); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976); *see also Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991) (this Court "do[es] not ordinarily address issues raised only by *amici*").

C.R.S. § 18-1-104(2). Class 2 misdemeanors—eighth out of eleven in degree of seriousness—are punishable only by 3-12 months in jail (not even in state prison), a fine of $250-1,000, or both. Comparable Class 2 misdemeanors include circulating a false statement designed to affect an election, C.R.S. § 1-13-109; failing to keep required records relating to charitable fundraising, C.R.S. § 6-16-111(1)(e); practicing barbering or cosmetology without a license, C.R.S. § 12-8-127; boxing without a license, C.R.S. § 12-10-110; and conducting a bingo game without a bingo-raffle license, C.R.S. § 12-9-114. Voting in the wrong precinct is a more serious Class 1 misdemeanor, punishable by up to $5,000 fine, 18 months in jail, or both. C.R.S. § 1-13-709. Class 1 misdemeanors also include third degree assault on a peace officer, C.R.S. § 18-1.3-501; unregistered telemarketing, C.R.S. § 6-1-305; and selling a motor vehicle without a license, C.R.S. § 12-6-121. Voting by knowingly giving a wrong residential address is a Class 5 felony, C.R.S. § 1-2-225, punishable by 1-3 years in prison, a fine of $1,000 to $100,000, or both. C.R.S. § 18-1.3-401. Sexual assault, including statutory rape, is a Class 1 misdemeanor (for consensual conduct with a 15-17 year old) or a Class 2-4 felony, depending on the circumstances. C.R.S. § 18-3-402. Yet Respondent asserts that Colorado made a deliberate policy choice to create a property interest in enforcement of this one particular Class 2 misdemeanor, mandating action by police that is not mandated by *any* of the more serious statutory crimes. It is hard to imagine that Colorado intended to create a property interest in mandatory enforcement for such violations of a marriage dissolution order as encumbering marital property without permission, treating such enforcement as of "paramount importance" even above enforcement of sexual assault crimes. *See* NBPA Br., at 5a (reprinting IACP Model Policy "that domestic violence be treated with *the same* consideration as violence in other enforcement contexts").

Colorado's Governmental Immunity Act also confirms that a property interest was not envisioned.[14] Government employees are expressly immune from liability for any injury claim "which lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by a claimant . . . unless the act or omission causing such injury was willful and wanton . . . ." C.R.S. § 24-10-118(2)(a). And the government entities themselves are absolutely immune from suit unless and to the extent that there is a waiver, not applicable here, at C.R.S. § 24-10-106(1).

Respondent's own *amici* recognize this Court's oft-stated rule that "the Due Process Clause should not be so stretched that it becomes 'a font of tort law to be superimposed upon whatever systems may already be administered by the States." NAWL Br., at 19 (quoting *Daniels* v. *Williams*, 474 U.S. 527, 332 (1986); *Paul* v. *Davis*, 424 U.S. 693, 701 (1976)); *see also Attica*, 477 F.2d, at 382 (declining to read mandatory arrest language as compulsory in the absence of a statutory deterrent). Yet that is precisely the result that would obtain here if Respondent's claim of property right were recognized, rending the express limitations in Colorado's tort scheme meaningless. As Respondent's *amici* concede, Colorado tort law "requires a heightened showing of intent," as well as "causation" and "reasonabl[e] foresee[ability]." NAWL Br., at 11-12 (citing, *e.g.*, *Ruegsegger* v. *Jefferson Cty. Bd. of Cty. Comm'rs*, 197 F.Supp.2d 1247, 1265 (D. Colo. 2001); *Smith* v. *State Comp. Ins. Fund*, 749

---

[14] Colorado's statutory immunity for good faith false arrests, C.R.S. § 18-6-803.5(5), does not alter this conclusion. Colorado cannot waive constitutional liability, of course. *See, e.g.*, *Sibron* v. *New York*, 392 U.S. 40, 61 (1968) ("[A State] may not . . . authorize police conduct which trenches upon Fourth Amendment rights"); *see also* C.R.S. § 18-6-803(d) ("The arrest and detention of a restrained person is governed by applicable constitutional . . . rules of criminal procedure"). Nor does the immunity compel the conclusion that the Colorado Legislature intended a property interest rather than mere law enforcement guidance.

P.2d 462, 464 (Colo. App. 1987)). "The number of causal steps separating the initial wrongful act (police inaction) from its ultimate effect (domestic violence by another wrongful actor) raises doubts as to whether the injury at issue could reasonably have been foreseen." NAWL Br., at 12. Although Respondent and her *amici* are of the view that "treating failure to enforce restraining orders as a problem of constitutional dimensions [would send] a strong and necessary message," *id.*, at 10, Colorado chose instead to place increased emphasis on domestic violence and other kinds of restraining orders by establishing model enforcement procedures for its police officers, without subjecting them to tort (and potentially constitutional) liability for failure to adhere to those procedures. Colorado's decision *not* to provide the holder of a restraining order with a tort remedy after an erroneous (though non-willful and wanton) decision by police, is inconsistent with the idea that it was creating a property interest subject to the Constitution's procedural guarantees.

CONCLUSION

For the reasons stated above and previously, the decision of the Tenth Circuit should be reversed, and the decision of the District Court granting Defendants' Motion to Dismiss should be reinstated.

Respectfully submitted,

THOMAS S. RICE
ERIC M. ZIPORIN
Counsel of Record
Senter Goldfarb & Rice, L.L.C.
1700 Broadway, Suite 1700
Denver, Colorado 80290
(303) 320-0509

JOHN C. EASTMAN
c/o Chapman University
School of Law
One University Drive
Orange, CA 92866

ERIK S. JAFFE
Erik S. Jaffe, P.C.
5101 34th Street, NW
Washington D.C. 20008

Counsel for Petitioners

SUPREME COURT, U.S.
FILED
DEC 23 2004
OFFICE OF THE CLERK

(6)

No. 04-278

In the Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO, PETITIONER

v.

JESSICA GONZALES, INDIVIDUALLY AND AS NEXT BEST FRIEND OF HER DECEASED MINOR CHILDREN, REBECCA GONZALES, KATHERYN GONZALES, AND LESLIE GONZALES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

JOHN P. ELWOOD
Assistant to the Solicitor General

MICHAEL JAY SINGER
HOWARD S. SCHER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Tenth Circuit erred in holding that the Town of Castle Rock is liable under 42 U.S.C. 1983 for violating the procedural due process rights of respondent, who was issued a restraining order under state law during divorce proceedings, because police failed to provide adequate procedures before they declined to arrest her estranged husband for violating the terms of the order.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statutory provisions involved	1
Statement	2
Summary of argument	8
Argument:	
Petitioner did not deprive respondent of a protected "property interest" without due process of law	10
A. Respondent lacked a protected property interest in police enforcement of the restraining order	12
1. The language of the restraining order did not create a property interest in police enforcement	13
2. Colorado law does not create a property interest in police enforcement of a restraining order	14
a. Colorado law does not create a mandatory duty	15
b. Colorado law does not support a legitimate claim of entitlement to police enforcement of the restraining order	17
c. Recognizing a property interest in the enforcement of restraining orders would disrupt law enforcement and impose unwarranted liability	23
B. Even assuming that respondent had a protected interest in police enforcement of the restraining order, the procedures employed were constitutionally adequate	26
Conclusion	30
Appendix	1a

TABLE OF AUTHORITIES

Cases:	Page
Alexander v. *Sandoval*, 532 U.S. 275 (2001)	20
American Mfrs. Mut. Ins. Co. v. *Sullivan*, 526 U.S. 40 (1999)	13
Archie v. *City of Racine*, 847 F.2d 1211 (7th Cir. 1988), cert. denied, 489 U.S. 1065 (1989)	23, 26
Atwater v. *City of Lago Vista*, 532 U.S. 318 (2001)	28
Barnhart v. *Peabody Coal Co.*, 537 U.S. 149 (2003)	16
Barry v. *Barchi*, 443 U.S. 55 (1979)	22
Bell v. *Burson*, 402 U.S. 535 (1971)	21, 22
Board of Pardons v. *Allen*, 482 U.S. 369 (1987)	21
Board of Regents v. *Roth*, 408 U.S. 564 (1972)	12, 13
Boddie v. *Connecticut*, 501 U.S. 371 (1971)	27
Brock v. *Pierce County*, 476 U.S. 253 (1986)	16
California v. *Sierra Club*, 451 U.S. 287 (1981)	20
Cannon v. *University of Chicago*, 441 U.S. 677 (1979)	20
City of Riverside v. *Rivera*, 473 U.S. 1315 (1985)	15
Cleveland Bd. of Educ. v. *Loudermill*, 470 U.S. 532 (1985)	27
Connecticut Bd. of Pardons v. *Dumschat*, 452 U.S. 458 (1981)	13, 18
Cosco v. *Uphoff*, 195 F.3d 1221 (10th Cir. 1999), cert. denied, 531 U.S. 1081 (2001)	13
DeShaney v. *Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989)	5, 11, 25, 30
Dixon v. *Love*, 431 U.S. 105 (1977)	28
Doe by Fein v. *District of Columbia*, 93 F.3d 861 (D.C. Cir. 1996)	22, 23
Doe v. *Hennepin County*, 858 F.2d 1325 (8th Cir. 1988), cert. denied, 490 U.S. 1108 (1989)	23
Doe by Nelson v. *Milwaukee County*, 903 F.2d 499 (7th Cir. 1990)	21, 23
Estate of Gilmore v. *Buckley*, 787 F.2d 714 (1st Cir.), cert. denied, 479 U.S. 882 (1986)	26, 30

Cases—Continued:	Page
Farmer v. *City of Nashville*, 156 S.W. 189 (Tenn. 1913)	21
French v. *Edwards*, 80 U.S. (13 Wall.) 506 (1872)	16
Gilbert v. *Homar*, 520 U.S. 924 (1997)	27
Goebel v. *Colorado Dep't of Insts.*, 764 P.2d 785 (Colo. 1988)	17, 20
Goldberg v. *Kelly*, 397 U.S. 254 (1970)	22
Gonzaga Univ. v. *Doe*, 536 U.S. 273 (2002)	19, 20
Goss v. *Lopez*, 419 U.S. 565 (1975)	21, 22
Greenholtz v. *Nebraska Penal Inmates*, 442 U.S. 1 (1979)	21
Heckler v. *Chaney*, 470 U.S. 821 (1985)	9, 18
Hewitt v. *Helms*, 459 U.S. 460 (1983)	13, 21, 22
Ingraham v. *Wright*, 430 U.S. 651 (1977)	27, 30
Jones v. *Union County*, 296 F.3d 417 (6th Cir. 2002)	22
Kentucky Dep't of Corr. v. *Thompson*, 490 U.S. 454 (1989)	8, 13, 17, 20
Leake v. *Cain*, 720 P.2d 152 (Colo. 1986)	19, 20
Linda R.S. v. *Richard D.*, 410 U.S. 614 (1973)	9, 18
Mackey v. *Montrym*, 443 U.S. 1 (1979)	28, 29
Mathews v. *Eldridge*, 424 U.S. 319 (1976)	6, 26, 27, 28
Meachum v. *Fano*, 427 U.S. 215 (1976)	18
Memphis Light, Gas & Water Div. v. *Craft*, 436 U.S. 1 (1978)	21, 22, 29
Moog Indus. v. *FTC*, 355 U.S. 411 (1958)	18
Morrissey v. *Brewer*, 408 U.S. 471 (1972)	26
Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)	29
New York v. *Quarles*, 467 U.S. 649 (1984)	25
Olim v. *Wakinekona*, 461 U.S. 238 (1983)	21
Paul v. *Davis*, 424 U.S. 693 (1976)	1, 19
People ex rel. Dunbar v. *Gym of Am., Inc.*, 493 P.2d 660 (Colo. 1972)	17
Snowden v. *Hughes*, 321 U.S. 1 (1994)	11
South v. *Maryland*, 59 U.S. (18 How.) 396 (1856)	18

Cases—Continued: Page

Staley v. *Vaughn*, 17 P.2d 299 (Colo. 1932) 17
Turner v. *United States*, 248 U.S. 354 (1919) 18
United States v. *Barnett*, 376 U.S. 681 (1964) 27
United States v. *James Daniel Good Real Prop.*, 510 U.S. 43 (1993) 16
United States v. *Montalvo-Murillo*, 495 U.S. 711 (1990) 17
United States v. *Watson*, 423 U.S. 411 (1976) 29
Vitek v. *Jones*, 445 U.S. 480 (1980) 21
Wayte v. *United States*, 470 U.S. 598 (1985) 12, 18
Western Food Plan, Inc. v. *District Court*, 598 P.2d 1038 (Colo. 1979) 17
Youngberg v. *Romeo*, 457 U.S. 307 (1982) 11

Constitution, statutes and rules:

U.S. Const.:
Amend. V 1
Amend. XIV (Due Process Clause) ..... *passim*
12 U.S.C. 1731b(f) 24
22 U.S.C. 4111(b) 24
29 U.S.C. 482(b) 24
31 U.S.C. 3730(a) 24
38 U.S.C. 4325(b) 24
42 U.S.C. 1983 ..... 4, 19, 20, 26
Cal. Gov't Code § 26601 (West 1988) 24
Colo. Rev. Stat. (2004):
§ 14-4-105 (2003) 25, 27, 2a
§ 14-10-107(4)(b)(I) (2003) 23
§ 14-10-108 ..... 2, 1a
§ 14-10-108(2) 14, 1a
§ 18-1-1001(1) (2003) 23
§ 18-1-1001(7) (2003) 23
§ 18-6-803.5 ..... 8, 9, 10, 14, 15, 16, 17, 19
§ 18-6-803.5(1) 14

Statutes and rules: Page

§ 18-6-803.5(1.5)(a.5) 23, 1a
§ 18-6-803.5(2)(a) 24, 1a
§ 18-6-803.5(3) 5, 6, 7, 8, 14, 1a
§ 18-6-803.5(3)(a) 15, 19, 1a
§ 18-6-803.5(3)(b) 28, 1a
§ 18-6-803.5(3)(d) 19, 1a
§ 18-6-803.5(3)(e) 20, 1a
§ 18-6-803.5(6)(a) 20, 1a
§ 18-6-803.5(7) 25, 27, 1a
§ 19-2-707(1) (2003) 23
§ 19-2-707(4) (2003) 23
§ 31-4-112 (2003) 16
§ 139-3-15 (1953) 16
Conn. Gen. Stat. Ann. § 10-200 (West 2002) 24
Mass. Ann. Laws ch. 56, § 57 (Law Co-op. 2001) 24
Fed. R. Civ. P. 12(b)(6) 4
Colo. R. Civ. P.:
Rule 56(d) 14
Rule 107(c) 25

Miscellaneous:

1 *ABA Standards for Criminal Justice* (2d ed. 1980 & Supp. 1986) 15, 22
Caitlin E. Borgmann, Note, *Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect* DeShaney?, 65 N.Y.U. L. Rev. 1280 (1990) 19
Development in the Law—Legal Responses to Domestic Violence, 106 Harv. L. Rev. 1498 (1993) 12, 25, 29
W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* (5th ed. 1984) 19
Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* (2d ed. 1992) 15, 16

In the Supreme Court of the United States

No. 04-278

TOWN OF CASTLE ROCK, COLORADO, PETITIONER

v.

JESSICA GONZALES, INDIVIDUALLY AND AS NEXT BEST FRIEND OF HER DECEASED MINOR CHILDREN, REBECCA GONZALES, KATHERYN GONZALES, AND LESLIE GONZALES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns the liability of officials under the Due Process Clause of the Fourteenth Amendment for failing to protect individuals from private violence. Because of its role in the investigation and prosecution of federal crimes and in enforcing other statutory provisions, the United States has a substantial interest in the development of due process law, principles of public liability for private wrongs, and qualified immunity. The same due process principles that apply to state and local officials under the Fourteenth Amendment also apply to the federal government under the Due Process Clause of the Fifth Amendment. *Paul* v. *Davis*, 424 U.S. 693, 702 n.3 (1976).

STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in relevant part, "nor shall any state deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. Relevant statutory pro-

visions are set forth in an appendix to this brief. See App., *infra*, 1a-8a.

STATEMENT

1. On May 21, 1999, during divorce proceedings, respondent obtained a temporary restraining order (TRO) against her estranged husband, Simon Gonzales, from the state district court in Douglas County, Colorado. Pet. App. 125a. See generally Colo. Rev. Stat. § 14-10-108 (2004) (App., *infra*, 1a). The TRO, which was completed using a standard printed form, was directed to Mr. Gonzales and stated that "[y]ou may not molest or disturb the peace of the party or of any child," Pet. App. 89a, "[y]ou may not transfer, encumber, conceal, or in any way dispose of any property" except under specified circumstances, *ibid.*, and "[y]ou shall not enter * * * the home of the other party * * * and shall remain at least 100 yards away from [it]." *Id.* at 90a. Below the signature and seal of the issuing judge, the TRO form noted that there were "IMPORTANT NOTICES FOR RESTRAINED PARTIES AND LAW ENFORCEMENT OFFICIALS ON REVERSE." *Ibid.* The printed notices on the back of the form included a warning to the restrained party that "YOU MAY BE ARRESTED WITHOUT NOTICE IF A LAW ENFORCEMENT OFFICER HAS PROBABLE CAUSE TO BELIEVE THAT YOU HAVE KNOWINGLY VIOLATED THIS ORDER." *Id.* at 91a. The "NOTICE TO LAW ENFORCEMENT OFFICIALS" stated, in relevant part, "YOU SHALL USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING ORDER. YOU SHALL ARREST, OR, IF AN ARREST WOULD BE IMPRACTICAL UNDER THE CIRCUMSTANCES, SEEK A WARRANT FOR THE ARREST OF THE RESTRAINED PERSON WHEN YOU HAVE INFORMATION AMOUNTING TO PROBABLE CAUSE THAT THE RESTRAINED PERSON HAS VIOLATED OR ATTEMPTED TO VIOLATE ANY PRO-

VISION OF THIS ORDER" and had notice of the order. *Id.* at 91a-92a.

Mr. Gonzales was served with the TRO on June 4, 1999. Pet. App. 125a. The same day, by stipulation of the parties, the state court "made the TRO permanent," but modified the terms. *Ibid.* The permanent order granted Mr. Gonzales "parenting time" with the children on alternate weekends, during two weeks in the summer, and permitted "a mid-week dinner visit with the minor children" to be arranged upon "reasonable notice." C.A. Reh'g App. 30; Pet. App. 125a-126a. The order permitted him "to pick up the minor children from the home of [respondent] for parenting time purposes." C.A. Reh'g App. 30; Pet. App. 5a.

2. Shortly after 5 p.m. on Tuesday, June 22, 1999, without giving notice to respondent, Mr. Gonzales picked up the three girls while they were playing outside the home they shared with respondent. Pet. App. 126a. When respondent learned they were missing, she suspected that they had been taken by her husband, who, the complaint alleges, "had a history of suicidal threats and erratic behavior." *Ibid.* At approximately 7:30 p.m., respondent telephoned the Castle Rock Police Department for assistance, and two officers came to her home. *Ibid.* Respondent showed them a copy of the TRO and asked that it be enforced and that the three children be returned to her immediately. The officers stated that there "was nothing they could do about the TRO" and suggested that respondent contact the police again if the children had not returned by 10 p.m. *Ibid.*

At approximately 8:30 p.m., respondent spoke to Mr. Gonzales by telephone, and he told her that he had taken the children to an amusement park in Denver. Pet. App. 126a. Respondent contacted one of the officers who had responded to her earlier call and requested that someone check the amusement park for Mr. Gonzales and that an all-points bulletin be issued for him. The officer allegedly refused to do

so, and told respondent to wait until 10 p.m. to see if the children returned. *Id.* at 126a-127a. At approximately 10 p.m., respondent called the police and told the dispatcher that the children had not returned. She was told to call back at midnight. *Id.* at 127a.

At midnight, respondent called the police department and told the dispatcher that the children had not returned. Respondent then went to Mr. Gonzales' apartment and determined that he was not there. Respondent called the police from the apartment complex and was told to wait there for an officer to arrive. When no officer had arrived by 12:50 a.m., respondent went to the police station, where an officer took an incident report but, according to the complaint, did nothing further. Pet. App. 127a.

At approximately 3:20 a.m., Mr. Gonzales arrived at the police station and began shooting at the station with a handgun. Pet. App. 127a. The police returned fire and killed him. The police found the bodies of the three girls in his truck; Mr. Gonzales apparently killed them earlier that evening. *Ibid.*

3. Respondent filed suit in federal district court against the Town of Castle Rock (Town) and several police officers under 42 U.S.C. 1983. See Pet. App. 124a-130a. Respondent claimed that the Town and the officers "knowingly failed to perform their duties to [respondent] and the three children to protect them from, arrest or restrain Simon Gonzales, and such failure constituted a denial of the due process rights of [respondent] and the three children." *Id.* at 128a. Respondent alleged that the police department "maintains an official policy or custom that recklessly disregards a person's rights to police protection with respect to restraining orders, and provides for or tolerates the non-enforcement of restraining orders." *Id.* at 129a.

The district court dismissed the complaint for failure to state a claim. See Fed. R. Civ. P. 12(b)(6). Although the

complaint did not separately allege substantive and procedural due process claims, the court analyzed both theories in turn. The district court noted that *DeShaney* v. *Winnebago County Department of Social Services*, 489 U.S. 189, 196 (1989), held that the Due Process Clause does not generally impose on governments a duty to protect individuals from private violence, and that such a duty arises only when the government has a "special relationship" with individuals, or when the government itself creates the danger that causes the injury. Pet. App. 118a. The court found that neither of those circumstances was present here. *Id.* at 119a-120a. The court rejected respondent's claim that Colorado Revised Statutes Section 18-6-803.5(3), which provides in part that an officer "shall arrest" a restrained person when probable cause exists that he has violated a restraining order, see App., *infra*, 3a, gave respondent a property interest in enforcement of the restraining order and that the Town had deprived her of that interest without due process. The court concluded that the provision did not create a property interest because its language was not "mandatory" as police had discretion in determining whether probable cause existed. Pet. App. 121a-122a.

4. A panel of the court of appeals affirmed the dismissal of the substantive due process claim, but reversed the dismissal of the procedural due process claim. Pet. App. 99a-112a. The panel held that the language of Section 18-6-803.5(3) "creates a mandatory duty to arrest when probable cause is present," giving the holder of a restraining order "a legitimate claim of entitlement to the protection provided by arrest" (Pet. App. 110a) that was subject to due process protection. *Id.* at 111a.

5. The court of appeals granted rehearing en banc on the procedural due process issue. Pet. App. 97a-98a. By a 6-5 vote, the en banc court again reversed the dismissal of respondent's procedural due process claim, see *id.* at 1a-94a,

although the full court adopted a different rationale than the panel decision.

a. The majority held that the language on the back of the restraining order, coupled with the "similar" (Pet. App. 18a) language contained in Section 18-6-803.5, gave respondent a "property interest in the enforcement of the terms of her restraining order" (Pet. App. 12a) that entitled her to procedural due process before police could decline to arrest Mr. Gonzales. *Id.* at 12a-29a. The majority emphasized that the notices on the back of the form stated in "mandatory" (*id.* at 20a) terms that officers "*shall* use every reasonable means to enforce" the order and "*shall* arrest * * * the restrained person" when there was probable cause to believe he had violated the order. *Id.* at 17a. Although acknowledging that "police officers may have some discretion in how they enforce a restraining order," *id.* at 23a, the court concluded that the order limited police discretion by "mandat[ing] the arrest of Mr. Gonzales under specified circumstances" (*i.e.*, when there was probable cause he had violated the order). *Id.* at 19a.

After considering the factors set forth in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), see Pet. App. 38a, the majority concluded that the Due Process Clause requires police to follow a four-step process before declining to enforce a restraining order. Under that procedure, an officer must:

> determine whether a valid order exists, whether probable cause exists that the restrained party is violating the order, and whether probable cause exists that the restrained party has notice of the order. If, after completing these three basic steps, an officer finds the restraining order does not qualify for mandatory enforcement, the person claiming the right should be notified of the officer's decision and the reason for it.

Id. at 40a (citations omitted). The majority held that respondent's claim against the Town could proceed on the theory

that it had an established policy of not enforcing restraining orders because the police "did not consider [respondent's] request [for enforcement] in a timely fashion." *Id.* at 41a. Because the majority could not say that "a reasonable officer would have known that a restraining order, coupled with a statute mandating its enforcement, would create a constitutionally protected property interest," it held that the officers were entitled to qualified immunity. *Id.* at 42a-43a.

b. There were four dissenting opinions. Judge Kelly (joined by Chief Judge Tacha and Judge O'Brien) concluded that for respondent to have a valid due process claim, the property interest would have to arise from the language of Section 18-6-803.5 itself, because the supposedly mandatory language on which the majority relied was not contained in "the decretal paragraphs of the order," but in form notices that simply paraphrased the language of the statute (Pet. App. 45a & n.1), and the order did not bind police, who were "non-parties" to the divorce action. *Id.* at 45a. The statute, however, was not distinguishable from other state statutes providing that police "shall apprehend" offenders that had never been thought to create a property interest, see *id.* at 55a. Judge O'Brien (joined by Chief Judge Tacha and Judge Kelly) dissented on similar grounds, *id.* at 67a-88a, concluding that the "shall arrest" language of Section 18-6-803.5 "cannot overcome the pervasive understanding * * * that law enforcement is not liable for failing to protect citizens from the deliberate actions of third parties." *Id.* at 85a.

Judge McConnell (joined by Chief Judge Tacha and Judges Kelly and O'Brien) concluded that respondent's argument that the officers had "arbitrarily and for no legitimate reason failed to enforce the protective order" was "a quintessentially substantive claim" that was barred by *DeShaney*, Pet. App. 60a, and that the majority had improperly recast the claim as procedural. *Id.* at 58a-67a. Judge Hartz (joined by Chief Judge Tacha and Judge Kelly) wrote that the

purportedly mandatory language of Section 18-6-803.5 was best read as "a hortatory expression by the legislature" that preserved traditional police enforcement discretion, Pet. App. 92a-93a, and concluded that respondent had been afforded due process because she was given the opportunity to present to police evidence that the restraining order had been violated and to argue that arrest was the appropriate response. *Id.* at 94a.

SUMMARY OF ARGUMENT

The court of appeals majority erred by holding that the notice on the back of the TRO form, together with Colorado Revised Statutes Section 18-6-803.5, so restricted the police officers' discretion that it "mandated the arrest of Mr. Gonzales" (Pet. App. 19a) and gave respondent "a protected property interest in the enforcement of the terms of her restraining order." *Id.* at 11a-12a. The language on which the majority relied was not in the restraining order itself, but in a printed notice on the back of the TRO form, below the judge's signature. That notice imposed no duty on police, who were not a party to the litigation, but simply paraphrased the relevant statute solely for informational purposes. Nor does Section 18-6-803.5 create any mandatory duty. Although the statute provides that police "shall arrest" suspected violators of restraining orders, that must be read in light of the discretion implicit in the more general requirement that police use only "reasonable" means to enforce the statute, and in light of the historical understanding that arrest statutes, which commonly are drafted in mandatory terms, preserve police discretion to make enforcement decisions based on current resources and needs.

Even if Section 18-6-803.5 imposed a duty of enforcement on police, it does not follow that respondent had "a legitimate claim of entitlement" such that she "could reasonably expect to enforce the[] [statute] against the [police] officials." *Kentucky Dep't of Corr.* v. *Thompson*, 490 U.S. 454, 460, 465

(1989). The enforcement provisions of the statute concern a subject—government enforcement decisions—that this Court has held to be presumptively beyond the scope of judicial review, see generally *Heckler* v. *Chaney*, 470 U.S. 821 (1985). In addition, this Court has recognized that private citizens lack a judicially cognizable interest in the prosecution of another person, see *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973). Accordingly, courts should recognize an entitlement to enforcement only when the legislature has clearly indicated that to be its intent. The language of Section 18-6-803.5 points to the opposite conclusion. Because the enforcement provisions of Section 18-6-803.5 do not even directly mention the protected party, and regulate the conduct of police with respect to the restrained party, they are best construed to provide procedural guides for police rather than to create rights in the holders of restraining orders. In addition, Section 18-6-803.5 does not afford the holders of restraining orders any right to a hearing or other remedial action that this Court has taken as evidence of recognition of a protected interest. Recognizing a property interest in the enforcement of restraining orders will disrupt law enforcement efforts because the risk of personal liability will force officials to give detailed consideration to even minor alleged violations in cases involving no risk of violence, even when it diverts resources from addressing more serious crimes or public emergencies.

Even if this Court were to recognize for the first time a property interest in police enforcement of criminal laws, police satisfy the requirements of due process when, as here, they permit the holder of the restraining order to present evidence of a violation of the order and argue that arrest is the proper response. The need for formal procedural protections before police decline immediate enforcement is undercut by the fact that the holder of a restraining order also can enforce its provisions through contempt proceedings, and

police can be asked to reconsider their decision when the need for immediate enforcement becomes more critical. The state has a significant countervailing interest in administrative simplicity. The procedures adopted by the court of appeals would not improve decisionmaking because the facts to be proved by the holder of a restraining order are rarely in dispute, and enforcement decisions often turn on the availability of police resources and police assessment of risk, neither of which would be affected by more elaborate procedural protections. Finally, the lack of historical precedent for affording citizens formal procedures before police decline to take enforcement action against third parties counsels against finding such a right here.

ARGUMENT

PETITIONER DID NOT DEPRIVE RESPONDENT OF A PROTECTED "PROPERTY INTEREST" WITHOUT DUE PROCESS OF LAW

By a narrow majority, the court of appeals concluded that respondent's restraining order, together with the language of Colorado Revised Statutes Section 18-6-803.5, so restricted the police officers' discretion upon a showing that "specific objective criteria" had been met (Pet. App. 28a) (*i.e.*, there was probable cause that the restrained party had violated the order), that it "mandated the arrest of Mr. Gonzales" (*id.* at 19a), and respondent thus "possessed a protected property interest in the enforcement of the terms of her restraining order." *Id.* at 11a-12a. That conclusion misapprehends the nature of the notices on the back of the TRO form; fails to consider the statutory language in textual and historical context; ignores a long tradition of judicial noninterference in executive enforcement decisions; and would disrupt legitimate police enforcement efforts and saddle municipalities with unprecedented and unwarranted liability. Even accepting the allegations of the complaint as true,

respondent has not stated a procedural due process claim under the Fourteenth Amendment.

At bottom, respondent advances the same complaint as the plaintiffs in *DeShaney* v. *Winnebago County Department of Social Services*, 489 U.S. 189 (1989)—that the State should have done more to prevent one citizen from inflicting grievous harm on another. But as this Court emphasized in *DeShaney*, the purpose of the Due Process Clause was "to protect the people from the State, not to ensure that the State protected them from each other." 489 U.S. at 196. Respondent and the court below identify two differences between this case and *DeShaney*: 1) respondent's claims, unlike those in *DeShaney*, are based on obligations imposed by court order and statute rather than arising from the Due Process Clause itself; and 2) her claims sound in procedural, rather than substantive, due process. Neither of those differences supports the finding of a constitutional violation here where none existed in *DeShaney*.

First, even a much clearer duty on the part of police to enforce a restraining order than is provided by Colorado law would not give rise to a due process violation. Even a statute that imposed on police an absolute duty to arrest in response to any claimed violation of a restraining order (putting to one side the restrained party's constitutional objections to such a statute) would not give rise to a due process violation in a case where police did not respond. Nothing in the Due Process Clause converts every failure of a State to perform a duty mandatory under a state statute into a federal constitutional violation. *E.g.*, *Snowden* v. *Hughes*, 321 U.S. 1, 11 (1944); *Youngberg* v. *Romeo*, 457 U.S. 307, 330 n.* (1982) (Burger, C.J., concurring in the judgment).

Second, respondent's effort to hold the Town accountable for the harm Simon Gonzales inflicted on respondent's daughters does not become viable by reconceptualizing it as a procedural due process claim. Respondent's effort to have

the courts impose on police a set of procedures for handling claims of restraining-order violations runs into two obstacles. First, it is difficult to square with the traditional rule that courts do not review executive enforcement decisions, *e.g.*, *Wayte* v. *United States*, 470 U.S. 598, 608 (1985), as well as the historical absence of constitutionally imposed procedural requirements for responding to citizen complaints. More fundamentally, respondent's real complaint is not with the procedures applied, but with the Town's failure to respond promptly to her complaints and prevent a tragedy. See Pet. App. 63a (McConnell, J., dissenting); see generally *Developments in the Law—Legal Responses to Domestic Violence*, 106 Harv. L. Rev. 1498, 1564 & n.92 (1993) ("to require *procedural* protections [for the enforcement of restraining orders] * * * would be pointless" because enforcement "does not depend on controvertible facts"; "[t]his is one way in which some claims now framed as procedural due process violations are really about substantive wrongs").

In the end, as in *DeShaney*, the real complaint is not a classic substantive due process claim that a certain law is beyond the legislature's power to enact, nor a classic procedural due process challenge to the sufficiency of the procedures provided by law, but a complaint that the government should have intervened to prevent a tragedy. As *DeShaney* makes clear, the courts have never recognized a constitutional claim of that type.

A. Respondent Lacked A Protected Property Interest In Police Enforcement Of The Restraining Order

Because the "requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property," *Board of Regents* v. *Roth*, 408 U.S. 564, 569 (1972), the "first inquiry in every due process challenge is whether" the interest asserted by the plaintiff constitutes "a protected interest in 'property' or 'liberty'" within the meaning of the

Due Process Clause. *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 59 (1999). "[I]t is well-settled that only a limited range of interests fall within this provision." *Hewitt* v. *Helms*, 459 U.S. 460, 466 (1983). To qualify as a protected property interest, "the interest must rise to more than 'an abstract need or desire,' and must be based on more than 'a unilateral hope.' Rather, an individual claiming a protected interest must have a legitimate claim of entitlement to it." *Kentucky Dep't of Corr.* v. *Thompson*, 490 U.S. 454, 460 (1989) (quoting *Roth*, 408 U.S. at 577, and *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U.S. 458, 465 (1981)).

1. *The Language Of The Restraining Order Did Not Create A Property Interest In Police Enforcement*

The court of appeals held that the language of the restraining order was "so mandatory that it creates a right to rely on that language thereby creating an entitlement that could not be withdrawn without due process." Pet. App. 15a (quoting *Cosco* v. *Uphoff*, 195 F.3d 1221, 1223 (10th Cir. 1999) (per curiam), cert. denied, 531 U.S. 1081 (2001)). That conclusion was mistaken.

First, the language on which the court of appeals relied was not in the restraining order itself, but in a printed notice on the back of the form. The operative portion of the order —the section specifying what the court order commands—is directed at Mr. Gonzales alone, and begins "IT IS ORDERED THAT" and ends with the judge's signature and seal. See Pet. App. 89a-90a. While the face of the order, below the judge's signature, states "PLEASE NOTE: IMPORTANT NOTICES * * * ON REVERSE," Pet. App. 90a, nothing in the order incorporates those notices by reference or suggests they are included in the court's commands. Second, context indicates that that language was intended to serve a purely informational function. The language was explicitly denominated as a "NOTICE" and placed on the back of the form beneath the judge's signature, was ad-

dressed only to a nonparty to the litigation, cf. Colo. R. Civ. P. 65(d) (restraining order "is binding only upon the parties to the action"), and simply paraphrased relevant Colorado law. A directive to law enforcement officials is not included among the provisions that Colorado law explicitly authorizes a party requesting a restraining order to seek, see Colo. Rev. Stat. § 14-10-108(2) (2004), and Colorado law does not indicate that an officer's failure to enforce such an order is a "violation of a protection order." *Id.* § 18-6-803.5(1).

While the restraining order may have, as the majority concluded, "define[d] [respondent's] rights," Pet. App. 16a, "whatever substantive rights were declared or established by the court [were] only * * * in relation to her husband, the only other party to the litigation." *Id.* at 74a (O'Brien, J., dissenting). Whatever obligation police had to enforce the terms of the restraining order stemmed—as respondent claimed, see, *e.g.*, Resp. C.A. Reh'g Br. 9; Resp. C.A. Br. 9; Resp. to Mot. to Dismiss 5—not from the notice provisions, but from the language of Section 18-6-803.5 itself.

2. *Colorado Law Does Not Create A Property Interest In Police Enforcement Of A Restraining Order*

The court of appeals' conclusion also relied on the use of "mandatory" (Pet. App. 27a) language in Section 18-6-803.5. The court noted that that provision states that police "*shall* use every reasonable means to enforce a restraining order" and "*shall* arrest" when an officer has probable cause that the restrained person "has violated or attempted to violate" the order. Pet. App. 18a (emphasis added) (quoting Colo. Rev. Stat. § 18-6-803.5(3)). The court reasoned that "[t]he word 'shall' is mandatory, not precatory," *id.* at 27a, so that "once probable cause exists, any discretion the officer may have possessed in determining whether or how to enforce the restraining order is wholly extinguished." *Id.* at 22a.

a. *Colorado Law Does Not Create A Mandatory Duty*

While the use of the word "shall" in a statute ordinarily suggests that action is mandatory, the context of Section 18-6-803.5 indicates that the police retain discretion in its enforcement. To begin with, the provision stating that police "shall arrest" a suspected violator must be read in the context of the more general command that immediately precedes it, which provides that police "shall use every *reasonable* means to enforce a protection order," Colo. Rev. Stat. § 18-6-803.5(3)(a) (2004) (emphasis added). That provision suggests that police may take only those actions that are reasonable under the circumstances, which necessarily requires the exercise of discretion. Cf. *City of Riverside* v. *Rivera*, 473 U.S. 1315, 1319 (1985) (Rehnquist, J., in chambers) (indicating that what is "'reasonable' * * * involves substantial elements of judgment and discretion"). Indeed, the notice provided to the restrained party on the back of the TRO form is consistent with the police officers' retention of discretion. See Pet. App. 91a ("YOU MAY BE ARRESTED" if police have probable cause that the order was violated). Consistent with this language and the statutory and historical context, no Colorado court has interpreted the arrest provision of Section 18-6-803.5 to be mandatory.

More fundamentally, the court of appeals' conclusion overlooks the unique context of the enforcement of criminal statutes. Although "[a]rrest statutes are commonly drafted in mandatory terms," Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 13.2(b), at 625 (2d ed. 1992), and "each and every state [has] long-standing statutes that, by their terms, seem to preclude nonenforcement by the police," 1 *ABA Standards for Criminal Justice* 1-4.5, commentary, at 1-124 (2d ed. 1980 & Supp. 1986), "it has been recognized that * * * [those statutes] clearly do not mean that a police officer may not lawfully decline to arrest." *Id.* at 1-125;

accord *Criminal Procedure*, *supra*, § 13.2(b), at 625. For a number of reasons, including the intentionally broad wording of criminal statutes and the provision of insufficient resources for their full enforcement, such statutes have long been construed to permit police to decline enforcement even when they have probable cause to believe there has been a violation. As this Court has long recognized, "many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them . . . do not limit their power." *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 65 (1993) (quoting *French* v. *Edwards*, 80 U.S. (13 Wall.) 506, 511 (1872)); cf. *Brock* v. *Pierce County*, 476 U.S. 253, 256, 265 (1986) (holding that statutory provision stating that the Secretary of Labor "'shall' determine 'the truth of [an] allegation'" within 120 days was meant "to spur the Secretary to action, not to limit his authority"); *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 158-159 (2003). Courts should be reluctant to construe such language to constrain executive officers' traditional discretion to tailor enforcement decisions to current resources and community needs. See p. 18, *infra*.

Other provisions of Colorado law confirm that the language of Section 18-6-803.5 was not meant to impose an inflexible duty to arrest. Colorado law has long provided that the "chief of police, or any member of the police force *shall suppress* all riots, disturbances, and breaches of the peace, *shall apprehend* all disorderly persons in the city, * * * *shall pursue and arrest* any person fleeing from justice," and "*shall apprehend* any person in the act of committing any offense" and bring that person before a "judge * * * for examination and trial." Colo. Rev. Stat. § 31-4-112 (2003) (emphasis added); see *id.* § 139-3-15 (1953). We are unaware of any published decision of a Colorado court indicating that those provisions create a mandatory duty of enforcement. The case law suggests the contrary. The Colorado Supreme

Court has interpreted statutes providing that certain action "shall" be taken as "necessarily precatory" when context indicated the language was not meant to be binding. *Goebel* v. *Colorado Dep't of Insts.*, 764 P.2d 785, 802 (1988). In addition, that court repeatedly has emphasized that executive-branch officials have broad discretion over enforcement decisions.[1] Thus, Section 18-6-803.5 cannot be said to "mandate[] the outcome to be reached upon a finding that the relevant criteria have been met." *Thompson*, 490 U.S. at 462.

b. *Colorado Law Does Not Support A Legitimate Claim Of Entitlement To Police Enforcement Of The Restraining Order*

Even if Section 18-6-803.5 were to impose on police a duty to arrest violators of restraining orders, it would not follow that respondent had "a legitimate claim of entitlement" to enforcement such that *she* "could reasonably expect to enforce the[] [statute] against the [police] officials." *Thompson*, 490 U.S. at 460, 465; cf. *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 717 (1990) ("There is no presumption or general rule that for every duty imposed upon * * * the Government and its prosecutors there must exist some corollary punitive sanction for departures or omissions."). The language of Section 18-6-803.5 cannot be read to create a legitimate claim of entitlement to enforcement of the restraining order and the arrest of her husband.

To begin with, the arrest provisions of the statute concern a subject—executive enforcement decisions involving third parties—that traditionally has not been subject to judicial

---

[1] See, *e.g.*, *People ex rel. Dunbar* v. *Gym of Am., Inc.*, 493 P.2d 660, 669 (Colo. 1972) (holding that attorney general has authority to "choose, depending upon the circumstances of the case" from various enforcement options); *Western Food Plan, Inc.* v. *District Court*, 598 P.2d 1038, 1041 (Colo. 1979); cf. *Staley* v. *Vaughn*, 17 P.2d 299, 301 (Colo. 1932) ("reasonable discretion should and must be used to effectively exercise the police power").

review. In determining whether a law creates a liberty or property interest, this Court has observed that decisions that "have not traditionally been the business of courts * * * are rarely, if ever, appropriate subjects for judicial review." *Dumschat*, 452 U.S. at 464; accord *Meachum* v. *Fano*, 427 U.S. 215, 225 (1976). A "decision not to prosecute or enforce, whether through civil or criminal process, is * * * generally committed to an agency's absolute discretion" and "the presumption is that judicial review is not available." *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985). Courts are "properly hesitant to examine" enforcement decisions because of the traditional executive discretion to decide how best to enforce the law given current resources and community needs. *Wayte*, 470 U.S. at 608; *Moog Indus.* v. *FTC*, 355 U.S. 411, 413 (1958) (per curiam). As the Court has noted in the context of prosecutorial discretion, "[t]his broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." *Wayte*, 470 U.S. at 607; accord *Chaney*, 470 U.S. at 831. Moreover, because of "the special status of criminal prosecutions in our system," "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973).

Claims challenging police arrest decisions arise most commonly in the context of tort actions arising from the failure to prevent crimes that caused injury. This Court has long noted the "lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace." *Turner* v. *United States*, 248 U.S. 354, 358 (1919) (Brandeis, J.); accord *South* v. *Maryland*, 59 U.S. (18 How.)

396, 403 (1856) (holding that sheriff was not liable for failure to prevent kidnapping). The "overwhelming current of decisions * * * reject[s] liability" for failure to provide police protection. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 1050 (5th ed. 1984). Colorado appears to adhere to that general rule. *E.g.*, *Leake* v. *Cain*, 720 P.2d 152, 160-163 (Colo. 1986).[2]

Because of this background principle that private parties lack a legally cognizable interest in police enforcement, courts ordinarily recognize an entitlement to enforcement only when the legislature has clearly indicated that to be its intent. But far from clearly creating such an entitlement, two features of Section 18-6-803.5 suggest the opposite conclusion.

First, "the provision[] entirely lack[s] * * * 'rights-creating' language." *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 287 (2002). The enforcement provisions of Section 18-6-803.5 narrowly focus on the conduct of *police* with respect to the restrained party and do not even *mention* the protected party. Thus, the "focus [of those provisions] is two steps removed" (*Gonzaga Univ.* v. *Doe*, 536 U.S. at 287) from the protected party. The only provisions of the statute that direct police to take steps with respect to the protected party are limited to keeping that party informed of events.[3]

---

[2] A handful of state courts have held that the holder of a protective order can recover in tort against police officers who negligently fail to prevent violence by the restrained party. See Caitlin E. Borgmann, Note, *Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect* DeShaney*?*, 65 N.Y.U. L. Rev. 1280, 1287 n.42 (1990) (collecting cases). Those cases are of little utility in determining liability under the much more stringent standards of the Due Process Clause and Section 1983. This Court has cautioned against making "the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul* v. *Davis*, 424 U.S. at 701; accord *DeShaney*, 489 U.S. at 202.

[3] Colo. Rev. Stat. § 18-6-803.5(3)(a) (2004) ("the protected person shall be provided with a copy" of the restraining order); *id.* § 18-6-803.5(3)(d)

The sole provision that discusses the holder of the restraining order in the context of protective services states merely that police are "authorized" to provide protection, not that they "shall" do so, see Section 18-6-803.5(6)(a), suggesting the legislature did not create any absolute entitlement to enforcement. See *Leake*, 720 P.2d at 162-163 (holding that statute providing that intoxicated persons "shall be taken into protective custody" did not "create a claim for relief against police officers who * * * release an intoxicated person" who later causes an accident); *Goebel*, 764 P.2d at 802 (holding that statutory language stating that legislature "shall appropriate" funds for services "do[es] not * * * create any rights in persons receiving services").

This Court has consistently held, in discussing whether a statute creates implied private rights of action or permits private enforcement under Section 1983, that statutory language "that focus[es] on the person regulated rather than the individuals protected create[s] 'no implication of an intent to confer rights on a particular class of persons.'" *Alexander* v. *Sandoval*, 532 U.S. 275, 289 (2001) (quoting *California* v. *Sierra Club*, 451 U.S. 287, 294 (1981)); accord *Gonzaga Univ.* v. *Doe*, 536 U.S. at 287; *Cannon* v. *University of Chicago*, 441 U.S. 677, 690-693 (1979). Similarly, the statutes and regulations that this Court has held created a claim of entitlement under the Due Process Clause consistently have

("[t]he law enforcement agency * * * shall make all reasonable efforts to contact the protected party upon the arrest of the restrained person"); *id.* § 18-6-803.5(3)(e) ("The agency shall give a copy of the agency's report * * * to the protected party."). See *Thompson*, 490 U.S. at 464 n.4 ("[T]he mandatory language requirement is not an invitation to courts to search regulations for *any* imperative that might be found. The search is for *relevant* mandatory language that expressly requires the decisionmaker to apply certain substantive predicates in determining whether [a claimant] may be deprived of the particular interest in question.").

directly addressed the protected party, rather than simply regulating a party whose actions affected them.[4]

This Court has interpreted mandatory statutory language to create a protected interest when it establishes predicates that appear designed "to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Olim* v. *Wakinekona*, 461 U.S. 238, 250 (1983). But the Court has also noted that "[t]he State may choose to require procedures for reasons other than protection against substantive rights, * * * [and] in making that choice the State does not create an independent substantive right." *Id.* at 250-251. Because the arrest and enforcement provisions of the statute do not mention the holder of the restraining order, the statutory language directing the police to take certain actions in investigating an alleged violation of a restraining order is best construed as "a set of *procedures* that guides [police] in their efforts to prevent [domestic violence]." *Doe by Nelson* v. *Milwaukee County*, 903 F.2d 499,

[4] See, *e.g.*, *Board of Pardons* v. *Allen*, 482 U.S. 369, 376 (1987) (statute provided that "the [parole] board shall release on parole * * * any person confined in the Montana state prison" when criteria were met); *Hewitt*, 459 U.S. at 471 n.6 ("[i]f no behavior violation has occurred, the inmate must be released"); *Vitek* v. *Jones*, 445 U.S. 480, 483 n.1, 489-490 (1980) (statute provided that when a psychologist "finds that a person committed to the department [of corrections] suffers from a mental disease or defect" the prison may "arrange for his transfer" to another facility); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 11 (1979) (statute provided that when parole board "considers the release of a committed offender * * * it shall order his release unless" certain conditions are present); *Goss* v. *Lopez*, 419 U.S. 565, 567, 573 (1975) (state law "provides for free education to all children" and that students cannot be suspended without notification and a hearing); *Bell* v. *Burson*, 402 U.S. 535, 536 n.1 (1971) (statute provided that State "shall suspend the [driver's] license * * * of the operator and owner of any motor vehicle" involved in an accident unless specified conditions were met); cf. *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 11 (1978) (case law provided that public utility was "obligated to provide service 'to all of the inhabitants of the city * * * without denial, except for good and sufficient cause'") (quoting *Farmer* v. *City of Nashville*, 156 S.W.189, 190 (Tenn. 1913)).

503 (7th Cir. 1990); accord *Doe by Fein* v. *District of Columbia*, 93 F.3d 861, 870 (D.C. Cir. 1996); cf. 1 *ABA Standards*, *supra*, § 1-4.5, commentary, at 1-125 ("As to third parties * * *, the full-enforcement statutes simply have no effect.").

Second, Section 18-6-803.5 does not attach any procedural rights to police enforcement of a restraining order or provide the holders of such orders any remedies against police. "The availability of such local-law remedies is evidence of the State's recognition of a protected interest." *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 11 (1978); *Goldberg* v. *Kelly*, 397 U.S. 254, 266 (1970).[5] Conversely, the absence of such protections from the Colorado statutory scheme is a telling indication that the State has not created an interest of sufficient stature to be denominated an "entitlement," and suggests that the statutes were meant to allow police officers to retain their traditional discretion (which, of course, does not require any specific procedures or third-party enforcement schemes). The procedures the court below sought to impose on police officers are novel and would almost convert police officers into limited-purpose magistrates.

Every other federal court of appeals to have addressed the question has held that comparable domestic-violence protection schemes do not create a protected liberty or property interest, even when a protective order has been issued or officials have made a preliminary determination of a need for protective services that triggers statutory obligations with respect to a specific individual.[6] The same conclusion is warranted here.

---

[5] See *Hewitt*, 459 U.S. at 470 n.6 (hearing); *Goldberg*, 397 U.S. at 260 (hearing and judicial review); *Barry* v. *Barchi*, 443 U.S. 55, 62 n.9, 64 n.11 (1979) (hearing); *Memphis Light*, 436 U.S. at 9-10 (state law provided civil suit for damages); *Goss*, 419 U.S. at 567, 573 (hearing); *Bell*, 402 U.S. at 537-538 & n.3 (hearing and judicial review).

[6] See, *e.g.*, *Jones* v. *Union County, Tenn.*, 296 F.3d 417, 429 (6th Cir. 2002) (although state law "requir[ed] a sheriff to serve" order on restrained party, no liberty or property interest implicated where sheriff failed to do so); *Doe by Fein*, 93 F.3d at 868 & n.8 (holding that procedural due process claim based on statute requiring officials to commence an investigation of reports of neglect was "severely flawed"); *Doe by Nelson* v. *Milwaukee County*, 903 F.2d at 503 (holding that state law requiring officials to initiate an investigation within 24 hours of receiving report of abuse did not create a property interest); cf. *Doe* v. *Hennepin County*, 858 F.2d 1325, 1328 (8th Cir. 1988) (rejecting claim that use of "the word 'shall in the statute' which requires certain reporting and investigative procedures" "creates a constitutionally protected entitlement"), cert. denied, 490 U.S. 1108 (1989); *Archie* v. *City of Racine*, 847 F.2d 1211, 1217-1218 (7th Cir. 1988) (en banc), cert. denied, 489 U.S. 1065 (1989).

c. *Recognizing A Property Interest In The Enforcement of Restraining Orders Would Disrupt Law Enforcement And Impose Unwarranted Liability*

The court of appeals' novel holding that the holders of restraining orders have a property interest in their enforcement will, if upheld, adversely affect the operations of law enforcement operations nationwide. Restraining orders are extremely common, and are not limited to domestic-relations cases. Colorado law provides for automatic imposition of a temporary restraining order in *every* divorce case, see Colo. Rev. Stat. § 14-10-107(4)(b)(I) (2003), and presumptively provides for a "mandatory restraining order" in every criminal case and juvenile delinquency case (which also restrains the juvenile's parents). *Id.* §§ 18-1-1001(1), 19-2-707(1). Officers' enforcement duties for those restraining orders are identical to those at issue here. See *id.* § 18-6-803.5(1.5)(a.5); § 18-1-1001(7); § 19-2-707(4). As noted by amici, 19 States have adopted statutes directing arrest when police have probable cause that restraining orders have been violated. See Br. of Int'l Mun. Lawyers Ass'n & Nat'l League of Cities in Supp. of Pet'r 5 (petition stage). In addition, many States and the federal government are subject to statutes that direct that officials "shall" perform specified tasks under cer-

tain circumstances.[7] Although the court of appeals limited its holding to cases in which both the restraining order and the statute purportedly imposed a duty to arrest, see Pet. App. 18a n.9, such cases will not be uncommon, and it is foreseeable that courts could subject governments to comparable duties when officers have cause to believe a violation of law has occurred, triggering statutory directives to investigate or take other action.

Upholding the Tenth Circuit's decision could disrupt law enforcement efforts by forcing officials to modify enforcement priorities to avoid personal liability for money damages. Although the Colorado legislature has classified violation of a restraining order as a fairly minor offense (it is ordinarily a class 2 misdemeanor, see Colo. Rev. Stat. § 18-6-803.5(2)(a) (2004)), the prospect of liability would require police to devote disproportionate resources to *every* alleged violation or attempted violation of a restraining order, however minor and nonviolent (including violations of restrictions on encumbering assets, see Pet. App. 89a), in *every*

[7] See, *e.g.*, 12 U.S.C. 1731b(f) (Secretary promptly "shall investigate" allegations and "shall order such violation, if found to exist, to cease forthwith"); 22 U.S.C. 4111(b) ("If a petition is filed with the Board * * * the Board shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, it shall provide an opportunity for a hearing."); 29 U.S.C. 482(b) ("The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days * * * , bring a civil action."); 31 U.S.C. 3730(a) ("The Attorney General diligently shall investigate a violation under section 3729."); 38 U.S.C. 4325(b) ("The inspector general shall investigate and resolve the allegation."); see also Cal. Gov't Code § 26601 (West 1988) ("The sheriff shall arrest and take before the nearest magistrate for examination all persons who attempt to commit or who have committed a public offense."); Conn. Gen. Stat. Ann. § 10-200 (West 2002) ("[t]he police in any town, city or borough * * * shall arrest all such children found anywhere beyond the proper control of their parents or guardians"); Mass. Ann. Laws ch. 56, § 57 (Law. Co-op. 2001) ("[p]olice officers * * * shall arrest without a warrant any person detected in the act of violating any provision of chapters fifty to fifty-six.").

case (including those entered as a matter of course in cases involving no history or risk of violence). Officers would be placed in the position of delaying response to more serious crimes or to public emergencies (such as riots or natural disasters) to apply the court of appeals' detailed four-part procedure to even nonviolent restraining-order violations because failure to do so would expose them to personal liability. This Court should "decline to place officers * * * in the untenable position of having to consider, often in a matter of seconds," *New York* v. *Quarles*, 467 U.S. 649, 657-658 (1984), whether to risk personal liability to pursue what they view to be a more pressing enforcement priority. That position is not made any easier by the prospect of Section 1983 liability if the officer errs in the other direction by arresting an individual without probable cause. Cf. *DeShaney*, 489 U.S. at 203 (noting that if the State had intervened too soon, it could have faced "charges based on the same Due Process Clause").

Rejecting respondent's claim would not, as the court of appeals concluded, render restraining orders "utterly valueless." Pet. App. 28a. When the restrained party's "behavior is not sufficiently serious to support criminal charges, an order ushers the victim into the legal system" and places clear and enforceable restrictions on the restrained party's conduct. See 106 Harv. L. Rev. at 1514. Even if police decline to pursue a violation of a restraining order, the protected party can initiate contempt proceedings against the restrained party or (under some circumstances) ask prosecutors to bring a contempt action. See Colo. Rev. Stat. § 18-6-803.5(7) (2004); *id.* § 14-4-105 (2003); Colo. R. Civ. P. 107(c). Moreover, in some States, a protected party can maintain a tort action against officers who fail to enforce a TRO, subject to whatever limitations state law imposes on suits against officials. Pursuing any of those courses permits the holder of a restraining order to enforce the order without

exposing municipal governments and officers to liability greater than that anticipated by the State legislature. By contrast, permitting recovery under the Due Process Clause through Section 1983 creates the possibility of liability far in excess of that available under state law, which, in the long term, may cause the jurisdiction to cut back on services (including emergency services) to make up budgetary shortfalls. Cf. *Archie* v. *City of Racine*, 847 F.2d 1211, 1218, 1223-1224 (7th Cir. 1988) (en banc) (Easterbrook, J.), cert. denied, 489 U.S. 1065 (1989). Thus, "absent a clear federal statutory or constitutional mandate, the development of state and municipal tort liability in this area is best left to state courts and legislatures." *Estate of Gilmore* v. *Buckley*, 787 F.2d 714, 722 (1st Cir.), cert. denied, 479 U.S. 882 (1986).

B. Even Assuming That Respondent Had A Protected Interest In Police Enforcement Of The Restraining Order, The Procedures Employed Were Constitutionally Adequate

Even if this Court were to recognize for the first time a property interest in police enforcement of criminal laws, the four-step procedure adopted by the court of appeals would far exceed the requirements of due process. Police would satisfy the requirements of due process when, as here, they permit the holder of the restraining order "to present evidence of a violation of the order and * * * to argue why an arrest is the proper response to the violation." Pet. App. 94a (Hartz, J., dissenting).

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). To determine what procedures are warranted in a given situation, this Court generally considers the three factors outlined in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976): 1) the private interest affected by the official action; 2) the risk of an erroneous deprivation of that interest through the procedures used, as

well as the likely value of additional safeguards; and 3) the government's interest, including the administrative burden that additional procedures would impose. Although "'the root requirement' of the Due Process Clause [is] 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest," *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Boddie* v. *Connecticut*, 501 U.S. 371, 379 (1971)), the Court has emphasized that the "'hearing' * * * need not be elaborate." *Id.* at 545. The Court has also emphasized the important role history and tradition play in determining what procedures are required, noting that when officials have followed "what 'has always been the law of the land, the case for administrative safeguards is significantly less compelling.'" *Ingraham* v. *Wright*, 430 U.S. 651, 679 (1977) (quoting *United States* v. *Barnett*, 376 U.S. 681, 692 (1964)).

As to the first *Mathews* factor, the weight to be given respondent's interest in police enforcement must be offset by two considerations. First, police enforcement is not the exclusive method of enforcing a restraining order; in non-emergencies, a protected party may commence contempt proceedings against the restrained party and in some circumtances may ask a prosecutor to do so. Colo. Rev. Stat. § 18-6-803.5(7) (2004); *id.* § 14-4-105 (2003); Pet. App. 91a; cf. *Mathews*, 424 U.S. at 343 (weighing availability of alternative income sources). Second, "in determining what process is due, account must be taken of 'the *length*' and '*finality* of the deprivation.'" *Gilbert* v. *Homar*, 520 U.S. 924, 932 (1997). An officer's denial of immediate enforcement generally is not conclusive of a protected party's rights. Police often make decisions about the timing of enforcement based on then-available resources and their assessment of the need for immediate action, and may monitor evolving situations so they can intervene promptly if circumstances become critical. As in this case, a party can return to police with more

information indicating that immediate enforcement is warranted in light of current circumstances. There is no indication that the interest asserted by respondent entails a right to enforcement on a specific timetable; indeed, the statute purportedly creating the property interest provides that police may forego immediate arrest and seek a warrant where immediate action "would be impractical." Colo. Rev. Stat. § 18-6-803.5(3)(b) (2004).

On the other side of the balance, the State has a significant interest in preserving flexibility and administrative simplicity by avoiding the imposition of rigid decisionmaking procedures. See *Mathews*, 424 U.S. at 348 (noting public interest "in conserving scarce fiscal and administrative resources"); *Dixon* v. *Love*, 431 U.S. 105, 114 (1977). The court of appeals' conclusion that its procedural requirements would only take "minutes to perform" (Pet. App. 41a) is both unduly optimistic and overlooks the costs in terms of the rigidity of the procedure and its administrability by laypersons frequently acting under significant time pressure. Cf. *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 347 (2001) (in Fourth Amendment context, noting "essential interest" in adopting "readily administrable rules" that are "clear and simple to be applied").

The final *Mathews* factor is the risk of erroneous deprivation and the likely value of any additional procedures. Although the officers clearly were mistaken about the risk of violence and need for immediate enforcement in this case, the "dictates of due process must be shaped by 'the risk of error inherent in the truthfinding process as applied to the generality of cases' rather than the 'rare exceptions.'" *Mackey* v. *Montrym*, 443 U.S. 1, 14 (1979). There has been no showing here that the usual process of informally receiving information from the holder of the restraining order was inherently faulty, or that the procedures adopted by the court of appeals would have brought new facts to the offi-

cers' attention. Although the procedures adopted by the court of appeals require police to undertake formal fact-finding about the existence of a restraining order and of probable cause that there has been a violation, "neither [of those facts] has ever been disputed" in this case, Pet. App. 64a (McConnell, J., dissenting). Nor does it appear that those facts would often be in dispute, because the order holder is likely to be the principal or only witness available to police at the time an initial enforcement decision is made. A police decision whether to seek immediate arrest or to wait upon further developments generally will not turn on facts that a protected party could prove in more formal proceedings, but instead likely will depend on matters within the exclusive knowledge of police (*e.g.*, competing demands on resources), or upon police assessment of the seriousness of the violation and the risk of violence. Under such circumstances, there is little to be gained from more formal procedures. 106 Harv. L. Rev. at 1564 & n.92; see generally *Mackey*, 443 U.S. at 14 (holding that predeprivation hearing was unnecessary where "there will rarely be any genuine dispute as to the historical facts providing cause for a suspension").

Under the circumstances, informal oral consultation between the holder of a restraining order and police would be sufficient and would provide "[t]he fundamental requisite of due process of law": "the opportunity to be heard." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). See, *e.g.*, *Memphis Light*, 436 U.S. at 16 (due process satisfied by "the provision of an opportunity for the presentation to a designated employee of a customer's complaint" before termination of utility service). There is simply no historical precedent for affording citizens formal procedures before police decline to take enforcement action against a third party. In *United States* v. *Watson*, 423 U.S. 411 (1976), this Court rejected the argument that agents should be prohibited from making warrantless arrests based on probable

cause when there was time to obtain a warrant. Although the Court observed that "an advance determination of probable cause by a magistrate would be desirable," because officers might "improperly assess the facts and thus unconstitutionally deprive an individual of liberty," the Court "declined to depart from the traditional rule by which the officer's perception is subjected to judicial scrutiny only after the fact." *Ingraham*, 430 U.S. at 679-680. "There is no more reason to depart from tradition and require advance procedural safeguards for intrusions on personal security to which the Fourth Amendment does not apply." *Id.* at 680.

* * * * *

Although the officers' failure to act promptly in this case may have caused respondent to suffer a grievous and tragic loss, it did not deprive her of any interest protected by the Due Process Clause. The decision of what remedy is to be afforded her "is best left to state courts and legislatures," *Estate of Gilmore*, 787 F.2d at 722, rather than to have a remedy "thrust upon the[] [State] by this Court's expansion of the Due Process Clause of the Fourteenth Amendment." *DeShaney*, 489 U.S. at 203.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General
PETER D. KEISLER
Assistant Attorney General
JOHN P. ELWOOD
Assistant to the Solicitor General
MICHAEL JAY SINGER
HOWARD S. SCHER
Attorneys

DECEMBER 2004

APPENDIX

1. Colorado Revised Statutes § 14-10-108 (2004) provides, in relevant part:

Temporary order in a dissolution case

(1) In a proceeding for dissolution of marriage, legal separation, the allocation of parental responsibilities, or declaration of invalidity of marriage or a proceeding for disposition of property, maintenance, or support following dissolution of the marriage, either party may move for temporary payment of debts, use of property, maintenance, parental responsibilities, support of a child of the marriage entitled to support, or payment of attorney fees. The motion may be supported by an affidavit setting forth the factual basis for the motion and the amounts requested.

(1.5) The court may consider the allocation of parental responsibilities in accordance with the best interests of the child, with particular reference to the factors specified in section 14-10-124 (1.5).

(2) As a part of a motion for such temporary orders or by an independent motion accompanied by an affidavit, either party may request the court to issue a temporary injunction:

(a) Restraining any party from transferring, encumbering, concealing, or in any way disposing of any property, except in the usual course of business or for the necessities of life, and, if so restrained, requiring him to notify the moving party of any proposed extraordinary expenditures and to account to the court for all extraordinary expenditures made after the order is issued;

(b) Enjoining a party from molesting or disturbing the peace of the other party or of any child;

(c) Excluding a party from the family home or from the home of the other party upon a showing that physical or emotional harm would otherwise result.

* * * * *

(5) A temporary order or temporary injunction:

(a) Does not prejudice the rights of the parties or the child which are to be adjudicated at subsequent hearings in the proceeding;

(b) May be revoked or modified prior to final decree on a showing by affidavit of the facts necessary to revocation or modification of a final decree under section 14-10-122; and

(c) Terminates when the final decree is entered, unless continued by the court for good cause to a date certain, or when the petition for dissolution or legal separation is voluntarily dismissed.

* * * * *

2. Colorado Revised Statutes § 14-4-105 (2003) provides:

Violations of orders

A person failing to comply with any order of the court issued pursuant to this article shall be found in contempt of court and, in addition, may be punished as provided in section 18-6-803.5, C.R.S.

3. Colorado Revised Statutes § 18-6-803.5 (2004) provides:

Crime of violation of a protection order—penalty —peace officers' duties

(1) A person commits the crime of violation of a protection order if such person contacts, harasses, injures, intimidates, molests, threatens, or touches any protected person or enters or remains on premises or comes within a specified distance of a protected person or premises or violates any other provision of a protection order to protect the protected person from imminent danger to life or health, and such conduct is prohibited by a protection order, after such person has been personally served with any such order or otherwise has acquired from the court actual knowledge of the contents of any such order.

(1.5) As used in this section:

(a) "Protected person" means the person or persons identified in the protection order as the person or persons for whose benefit the protection order was issued.

(a.5)(I) "Protection order" means any order that prohibits the restrained person from contacting, harassing, injuring, intimidating, molesting, threatening, or touching any protected person, or from entering or remaining on premises, or from coming within a specified distance of a protected person or premises or any other provision to protect the protected person from imminent danger to life or health, that is issued by a court of this state or a municipal court, and that is issued pursuant to:

(A) Article 14 of title 13, C.R.S., sections 18-1-1001, section 19-2-707, C.R.S., section 19-4-11, C.R.S., or rule 365 of the Colorado rules of county court civil procedure;

(B) Sections 14-4-101 to 14-4-105, C.R.S., section 14-10-107, C.R.S., section 14-10-108, C.R.S., or section 19-3-316, C.R.S. as those sections existed prior to July 1, 2004;

(C) An order issued as part of the proceedings concerning a criminal municipal ordinance violation; or

(D) Any other order of a court that prohibits a person from contacting, harassing, injuring, intimidating, molesting, threatening, or touching any person, or from entering or remaining on premises, or from coming within a specified distance of a protected person or premises.

(II) For purposes of this section only, "protection order" includes any order that amends, modifies, supplements, or supersedes the initial protection order. "Protection order" also includes any restraining order entered prior to July 1, 2003, and any foreign protection order as defined in section 13-14-104, C.R.S.

(b) "Registry" means the computerized information system created in section 18-6-803.7 or the national crime information center created pursuant to 28 U.S.C. sec. 534

(c) "Restrained person" means the person identified in the order as the person prohibited from doing the specified act or acts.

* * * * *

(2)(a) Violation of a protection order is a class 2 misde meanor; except that, if the restrained person has previously been convicted of violating this section or a former version of this section or an analogous municipal ordinance, or if the protection order is issued pursuant to section 18-1-1001, the violation is a class 1 misdemeanor.

* * * * *

(3)(a) Whenever a protection order is issued, the protected person shall be provided with a copy of such order. A peace officer shall use every reasonable means to enforce a protection order.

(b) A peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that:

(I) The restrained person has violated or attempted to violate any provision of a protection order; and

(II) The restrained person has been properly served with a copy of the protection order or the restrained person has received actual notice of the existence and substance of such order.

(c) In making the probable cause determination described in paragraph (b) of this subsection (3), a peace officer shall assume that the information received from the registry is accurate. A peace officer shall enforce a valid protection order whether or not there is a record of the protection order in the registry.

(d) The arrest and detention of a restrained person is governed by applicable constitutional and applicable state rules of criminal procedure. The arrested person shall be removed from the scene of the arrest and shall be taken to the peace officer's station for booking, whereupon the arrested person may be held or released in accordance with the adopted bonding schedules for the jurisdiction in which the arrest is made. The law enforcement agency or any other locally designated agency shall make all reasonable efforts to contact the protected party upon the arrest of the restrained person. The prosecuting attorney shall present any available arrest affidavits and the criminal history of the

restrained person to the court at the time of the first appearance of the restrained person before the court.

(e) The arresting agency arresting the restrained person shall forward to the issuing court a copy of such agency's report, a list of witnesses to the violation, and, if applicable, a list of any charges filed or requested against the restrained person. The agency shall give a copy of the agency's report, witness list, and charging list to the protected party. The agency shall delete the address and telephone number of a witness from the list sent to the court upon request of such witness, and such address and telephone number shall not thereafter be made available to any person, except law enforcement officials and the prosecuting agency, without order of the court.

(4) If a restrained person is on bond in connection with a violation or attempted violation of a protection order in this or any other state and is subsequently arrested for violating or attempting to violate a protection order, the arresting agency shall notify the prosecuting attorney who shall file a motion with the court which issued the prior bond for the revocation of the bond and for the issuance of a warrant for the arrest of the restrained person if such court is satisfied that probable cause exists to believe that a violation of the protection order issued by the court has occurred.

(5) A peace officer arresting a person for violating a protection order or otherwise enforcing a protection order shall not be held criminally or civilly liable for such arrest or enforcement unless the peace officer acts in bad faith and with malice or does not act in compliance with rules adopted by the Colorado supreme court.

(6)(a) A peace officer is authorized to use every reasonable means to protect the alleged victim or the alleged

victim's children to prevent further violence. Such peace officer may transport, or obtain transportation for, the alleged victim to shelter. Upon the request of the protected person, the peace officer may also transport the minor child of the protected person, who is not an emancipated minor, to the same shelter if such shelter is willing to accept the child, whether or not there is a custody order or an order allocating parental responsibilities with respect to such child or an order for the care and control of the child and whether or not the other parent objects. A peace officer who transports a minor child over the objection of the other parent shall not be held liable for any damages that may result from interference with the custody, parental responsibilities, care, and control of or access to a minor child in complying with this subsection (6).

* * * * *

(7) The protection order shall contain in capital letters and bold print a notice informing the protected person that such protected person may either initiate contempt proceedings against the restrained person if the order is issued in a civil action or request the prosecuting attorney to initiate contempt proceedings if the order is issued in a criminal action.

(8) A protection order issued in the state of Colorado shall contain a statement that:

(a) The order or injunction shall be accorded full faith and credit and be enforced in every civil or criminal court of the United States, another state, an Indian tribe, or a United States territory pursuant to 18 U.S.C. sec. 2265;

(b) The issuing court had jurisdiction over the parties and subject matter; and

(c) The defendant was given reasonable notice and opportunity to be heard.

Supreme Court, U.S.
FILED
FEB 10 2005
OFFICE OF THE CLERK

(13)

No. 04-278

IN THE
SUPREME COURT OF THE UNITED STATES

TOWN OF CASTLE ROCK, COLORADO,
Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children, REBECCA GONZALES, KATHERYN GONZALES, and LESLIE GONZALES,
Respondent.

On Writ of Certiorari To The
United States Court of Appeals
For the Tenth Circuit

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF RESPONDENT

STUART R. COHEN*
SUSAN ANN SILVERSTEIN
FRANCO A. MUNOZ
AARP FOUNDATION LITIGATION

MICHAEL SCHUSTER
AARP

601 E Street, NW
Washington, DC 20049
(202) 434-2060

Counsel for *Amicus Curiae* AARP
*Counsel of Record

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. ELDER ABUSE ALTHOUGH OFTEN UNREPORTED IS ENDANGERING MILLIONS OF OLDER MEMBERS OF OUR SOCIETY, THE TRULY FORGOTTEN VICTIMS OF DOMESTIC VIOLENCE .. 4

II. BY AFFIRMING THE TENTH CIRCUIT'S JUDGMENT THIS COURT WILL SEND A STRONG MESSAGE THAT ALL PROTECTIVE ORDERS MUST BE ENFORCED 7

CONCLUSION 10

TABLE OF AUTHORITIES

MISCELLANEOUS

AMERICAN PROSECUTOR'S RESEARCH INSTITUTE, U.S. DEP'T OF JUSTICE, PROTECTING AMERICA'S SENIOR CITIZENS: WHAT LOCAL PROSECUTORS ARE DOING TO FIGHT ELDER ABUSE 3 (2003) ... 4, 8

Candice Heisler, *The Role of the Criminal Justice System in Elder Abuse Cases*, 3 J. ELDER ABUSE & NEGLECT 6 (1991) 6

NATIONAL CENTER ON ELDER ABUSE, U.S. DEP'T OF HEALTH & HUMAN SERVICES, NATIONAL ELDER ABUSE INCIDENCE STUDY: FINAL REPORT §5-1 (1998) 9

N.R. Kleinfield, *Bowed by Age and Battered by an Addicted Nephew*, N.Y. TIMES, Dec. 12, 2004 ... 7

NATIONAL CENTER ON ELDER ABUSE, ELDER ABUSE INFORMATION SERIES, NO.1 7

NATIONAL CENTER ON ELDER ABUSE, ELDER ABUSE INFORMATION SERIES, NO. 2, TRENDS IN ELDER ABUSE IN DOMESTIC SETTINGS .. 5

OFFICE FOR VICTIMS OF CRIMES, U.S. DEP'T OF JUSTICE, ENFORCEMENT OF PROTECTIVE ORDERS 1 (Jan. 2002) 10

ROBERT C. DAVIS & JUANJO MEDINA-ARIZA, U.S. DEP'T. OF JUSTICE, RESULTS FROM AN ELDER ABUSE PREVENTION EXPERIMENT IN NEW YORK CITY 1 (Sep. 2001) 5, 7, 9

Rosalie S. Wolf, *The Nature and Scope of Elder Abuse*, 24 J. AM. SOC'Y ON AGING 3 (2000) 5, 6, 9, 10

Toshio Tatara, *Understanding the Scope and Nature of Domestic Elder Abuse with the Use of State Aggregate Data: Summaries of Key Findings of a National Survey of State APS and Aging Agencies*, 5 J. ELDER ABUSE & NEGLECT 35-37 (1993) 5

No. 04-278

IN THE

Supreme Court of the United States

Town of Castle Rock, Colorado,
Petitioner,

v.

Jessica Gonzales, individually and as next best friend of her deceased minor children, Rebecca Gonzales, Katheryn Gonzales, and Leslie Gonzales,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

AARP[1/] is a nonpartisan, nonprofit membership organization of more than 35 million dedicated to addressing the needs and interests of people age fifty and older. AARP seeks through education, bilingual publications, advocacy and

---

[1/] In compliance with Rule 37.3 of this Court, counsel for *amicus curiae* AARP states that all parties have given blanket consent to the filing of all *amicus curiae* briefs, as reduced to an Order by the Court on December 22, 2004. Further, in compliance with Rule 37.6 of this Court, *amicus curiae* AARP states that no counsel for any party authored this brief in whole or in part, and that no party or entity other than this *amicus curiae*, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

service to enhance the quality of life for all by promoting independence, dignity, and purpose.

AARP has taken a leadership role throughout the United States in educating legislators and the public on the serious problem of elder abuse. In 2003 AARP participated in the proposed Elder Justice Act, groundbreaking federal legislation aimed at assuring adequate public-private infrastructure and resources to detect, treat, understand, intervene in, and, where appropriate, prosecute elder abuse and neglect. In Utah, AARP helped draft a new vulnerable adult abuse statute and then lobbied for it in the state House and Senate. The bill passed both the House and Senate without a dissenting vote. In Maryland, AARP co-sponsored with the state Attorney General a series of town hall-style meetings that focused on preventing elder abuse and neglect. In Kentucky, AARP has helped disseminate information generated by the governor's Elder Abuse Commission. AARP has helped enhance New York's elder abuse program, helped draft elder abuse legislation in Iowa, and created an elder abuse awareness manual and video in California, among other projects. And, three years ago AARP initiated a program in Colorado called ElderWatch as a resource to older people who have fallen victim to various forms of elder abuse.

AARP is deeply concerned about the effects that the non-enforcement of protective orders would have on cases of elder abuse especially in cases involving actual or potential physical harm. AARP submits this brief *amicus curiae* in support of respondent and respectfully requests that the Court affirm the judgment of the Court of Appeals for the Tenth Circuit.

SUMMARY OF ARGUMENT

This brief *amicus curiae* shall focus on the need for enforcement of protective orders in elder abuse cases involving instances of physical(not economic) harm. The decision to not enforce a protective order can have a profound affect on elder abuse and the life of an older person. Repeated violence, physical harm and possibly death can occur as a result of elder

abuse. Many older people are unable to take measures to prevent physical abuse.

Unfortunately, there is no separate, comprehensive national protective order registry detailing the number of protective orders issued in elder abuse cases. Reported cases of elder abuse are, however, rapidly increasing throughout the United States, demonstrating that this is a serious and unresolved problem. The number of reported cases of elder abuse increased by 150% from 1986 to 1996. Experts agree that the actual number of cases is still grossly under-reported. For example, a Congressional study estimated that one out of every 25 older persons is a victim of elder abuse which would translate to approximately one million cases of elder abuse annually. In the same context a private study estimated that only one out of fourteen elder abuse cases comes to the attention of authorities. However, even these estimates may be low because elder abuse, like domestic violence, carries with it a stigma that many victims seek to avoid. Another reason that these estimates may be low is that a large number of the older people who are abused are homebound or are isolated and, therefore, completely out of the public eye. Victims of elder abuse are a particularly vulnerable segment of our society due to their age and physical frailty. Repeat victims of elder abuse have been shown to a have a shorter life expectancy than similarly situated non-victims.

Law enforcement is responsible for responding to and investigating instances of elder abuse and the enforcement of protective orders. Once a protective order is granted therefore, the protected older person becomes dependent on law enforcement to enforce the order and ensure no further abuse occurs. Properly enforced protective orders can protect the oldest and most vulnerable members of our society, while unenforced protective orders are worthless.

Accordingly, AARP respectfully requests that the Court affirm the judgment of the Court of Appeals for the Tenth Circuit.

ARGUMENT

I. ELDER ABUSE ALTHOUGH OFTEN UNREPORTED IS ENDANGERING MILLIONS OF OLDER MEMBERS OF OUR SOCIETY, THE TRULY FORGOTTEN VICTIMS OF DOMESTIC VIOLENCE.

The problem of elder abuse is growing and may prove to be much greater in the future as our population ages. Elder abuse in many ways is the forgotten form of domestic abuse. Significant research and attention has been focused on preventing abuse against women and children, but very little research has been conducted on abuse of older people. Enforcement of protective orders can prevent victims from further abuse and will save lives.

In general, a case of elder abuse involves at least one of the following acts or omissions: (1) an intentional act or attempt to inflict physical harm by anyone, or psychological harm by a caretaker; (2) non-consensual sexual contact; (3) failure by a caretaker to provide for satisfying a persons' basic life needs; *i.e.*, food, care, housing, medical attention, or other necessities; and, (4) illegal or inappropriate use or taking of an individual's assets or properties.[2/]

In the United States the number of reported cases of elder abuse is calculated by combining state reports of abuse cases with modifications for differences in definitions and

---

[2/] AMERICAN PROSECUTOR'S RESEARCH INSTITUTE, U.S. DEP'T OF JUSTICE, PROTECTING AMERICA'S SENIOR CITIZENS: WHAT LOCAL PROSECUTORS ARE DOING TO FIGHT ELDER ABUSE 3 (2003) [hereinafter, PROTECTING AMERICA'S SENIOR CITIZENS].

eligibility.[3/] This brief *amicus curiae* shall focus on reports of physical harm to older people, and not economic harm.

Virtually all State agencies charged with addressing the problem of elder abuse reported increases in their caseloads during the last survey.[4/] Reported cases of elder abuse increased by 150% from 1986 to 1996.[5/] Whether the rise in reported cases is due to an increase in the number of older people in our society or an in awareness of elder abuse is unknown. Although there are no new studies since the 1990s experts agree that there is still significant under-reporting of elder abuse.

Most elder abuse is actually domestic violence and the perpetrator, just as in other forms of domestic violence, is likely to be a close family member of the abused older person.[6/]

[3/] Rosalie S. Wolf, *The Nature and Scope of Elder Abuse*, 24 J. AM. SOC'Y ON AGING 3 (2000) (citing TOSHIO TATARA, NATIONAL CENTER ON ELDER ABUSE, AN ANALYSIS OF STATE LAWS ADDRESSING ELDER ABUSE, NEGLECT, AND EXPLOITATION (1995)), *available at* http://www.generationsjournal.org/gen-24-2/intro.html (last visited Jan. 31, 2005).

[4/] Toshio Tatara, *Understanding the Scope and Nature of Domestic Elder Abuse with the Use of State Aggregate Data: Summaries of Key Findings of a National Survey of State APS and Aging Agencies*, 5 J. ELDER ABUSE & NEGLECT 35-37 (1993).

[5/] *See* ROBERT C. DAVIS & JUANJO MEDINA-ARIZA, U.S. DEP'T. OF JUSTICE, RESULTS FROM AN ELDER ABUSE PREVENTION EXPERIMENT IN NEW YORK CITY 1 (Sep. 2001) (citing NATIONAL CENTER ON ELDER ABUSE, ELDER ABUSE INFORMATION SERIES, NO. 2, TRENDS IN ELDER ABUSE IN DOMESTIC SETTINGS), *available at* www.ncjrs.org/pdffiles1/nij/188675.pdf (last visited Jan. 31, 2005).

[6/] NATIONAL CENTER ON ELDER ABUSE, ELDER ABUSE INFORMATION SERIES, NO. 2, TRENDS IN ELDER ABUSE IN DOMESTIC SETTINGS, *at* http://www.elderabusecenter.org/pdf/basics/fact2.pdf (last visited Jan. 31, 2005) ("Adult Children are the most frequent abusers of the elderly, and this

The victim may be reluctant to prosecute because of the stigma attached to admitting to being a victim of elder abuse or due to "confusion, inadequate emotional or financial support, or lack of understanding about the process and end results of prosecution. . . . or from fear resulting from the defendant's intimidation."[7/]

In 1996 the House Select Committee on Aging and a separate private study concluded that the number of elder abuse cases was woefully under-reported. The Committee's report estimated that only one in five cases of elder abuse is reported to authorities.[8/] This ratio of reported to unreported cases may be low because a large number the older people who were abused are homebound, isolated and completely out of the public eye.[9/] The Committee's report estimated that each year one out of every 25 older people is victimized resulting in approximately one million cases of elder abuse annually.[10/] The private study, however, estimated that only one out of

---

category experienced the biggest increase in its composition of the total reports: 30.1 percent in 1990 to 36.7 percent in 1996. Other family members and spouses ranked as the next most likely abusers of older people. Other family members comprised 16.1 percent of all reports in 1990 and 10.8 percent of all reports in 1996, while spouses comprised 15.9 percent of all reports in 1990 and 12.6 percent in 1996.").

[7/] Candice Heisler, *The Role of the Criminal Justice System in Elder Abuse Cases*, 3 J. ELDER ABUSE & NEGLECT 6 (1991) (citing G.A. GOOLKASIAN, U.S. DEP'T OF JUSTICE, CONFRONTING DOMESTIC VIOLENCE: THE ROLE OF CRIMINAL COURT JUDGES (Nov. 1986)).

[8/] Heisler, *supra* note 7, at 27 n. 5.

[9/] Wolf, *supra* note 3, *available at* http://www.generationsjournal.org/gen-24-2/intro.html.

[10/] Heisler, *supra* note 7, at 5 (citing Claude Pepper, Chairman, Subcommittee on Aging; K. Pillemer & D. Finkelhor, *The Prevalence of Elder Abuse: A Random Sample Survey*, 28 GERONTOLOGIST 51-57 (1988) (Pillemer and Finkelhor estimated that the rate of elder abuse, excluding fiduciary abuse was 3.2 percent.)

fourteen elder abuse cases comes to the attention of authorities resulting in 820,000 to 1,860,000 victims of elder abuse annually.[11/] By either estimate it is clear that the majority of elder abuse cases went unreported to state protective services.

"The U.S. Bureau of the Census predicts that by 2030, the population over age 65 will nearly triple to more than 70 million and older people will make up more than 20 percent of the population (up from 12.3 percent in 1990)."[12/] An increase in reported cases of elder abuse will likely result as the population ages. Therefore, it can be anticipated that protective orders will have an increasingly important role in combating elder abuse.

II. BY AFFIRMING THE TENTH CIRCUIT'S JUDGMENT THIS COURT WILL SEND A STRONG MESSAGE THAT ALL PROTECTIVE ORDERS MUST BE ENFORCED.

Just as Jessica Gonzales was totally dependent upon the enforcement of a protective order to protect herself and her minor children, victims of elder abuse are also equally dependent on the enforcement of protective orders.[13/] The

---

[11/] NATIONAL CENTER ON ELDER ABUSE, ELDER ABUSE INFORMATION SERIES, NO.1, TYPES OF ELDER ABUSE IN DOMESTIC SETTINGS 1(citing TOSHIO TATARA & LISA KUZMESKUS, NATIONAL CENTER ON ELDER ABUSE, SUMMARIES OF STATISTICAL DATA ON ELDER ABUSE IN DOMESTIC SETTINGS FOR FY 95 AND FY 96 (1997); Karl Pillemer & David Finkelhor, *The Prevalence of Elder Abuse: A Random Sample Survey* 28 GERONTOLOGIST 51-57 (1988)), *available at* http://www.elderabusecenter.org/pdf/basics/fact1.pdf.

[12/] *See* DAVIS & MEDINA-ARIZA, *supra* note 5, at 1 (citing U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACTS OF THE UNITED STATES (11th ed. 1991)).

[13/] *See* N.R. Kleinfield, *Bowed by Age and Battered by an Addicted Nephew*, N.Y. TIMES, Dec. 12, 2004, *available at* http://www.nytimes.com/2004/12/12/nyregion/12elder.html (last visited Jan. 21, 2005) (This article details the tragic story of two elderly sisters battered,

importance of enforcing protective orders in domestic violence situations is unquestioned because it can provide relief from violence. The abuser and the victim in domestic violence and elder abuse situations share many similarities including the implications of non-enforcement of protective orders. The enforcement of the protective order is necessary to convince the abuser that violence against a spouse, child, or older person is still a crime.

Prosecutors have a key role in combating elder abuse by ensuring that protective orders are issued and abusers are prosecuted. Adult Protective Services workers identified prosecution of elder abusers as one of the most important services to be provided by law enforcement.[14] "At the same time they named prosecution the *most* difficult service to obtain from criminal justice professionals, citing a 'lack of interest or cooperation from prosecutors in bringing cases of elder abuse to court.'"[15] Abused older people must be able to have confidence that law enforcement will effectively enforce the protective order, just as they would enforce any other court order.

Failure to enforce protective orders can result in recurring harm and possibly death to the "protected" older

---

abused and forced to beg for money by their drug addicted nephew. One of the sisters had a protective order against the nephew, however, the order was not enforced for almost a year. During the course of the abuse the sisters lost their house, all of their possessions, and were severely beaten when they attempted to refuse to face the elements and beg on the streets of New York City for money to support the nephew's drug habit. Eventually a proactive and persistent police officer helped to enforce the protective order and ensured the nephew was arrested.)

[14] PROTECTING AMERICA'S SENIOR CITIZENS, *supra* note 2, at 4 (citing B.E. Blakely & Ronald Dolon, *Perceptions of Adult Protective Services Workers of the Support Provided By Criminal Justice Processionals in a Case of Elder Abuse*, 12 J. ELDER ABUSE & NEGLECT 3-4 (2000)).

[15] PROTECTING AMERICA'S SENIOR CITIZENS, *supra* note 2, at 4 (emphasis in original).

person. Abused older people are a particularly vulnerable segment of our society. Studies have shown that three out of four abused and neglected older people suffer from physical frailty. About one-half (47.9%) of the substantiated cases of abuse and neglect involved older people who were not physically able to care for themselves, while 28.7% of victims could care for themselves marginally.[16] Clinical accounts have documented severe emotional distress and an increased mortality rate among mistreated older people.[17] Of the few studies[18] that record the effects of elder abuse on the victims some have suggested that elder abuse causes the victims to incur feelings of helplessness, alienation, guilt, shame, fear, anxiety, denial, and posttraumatic stress syndrome. In one study the mortality rates of the non-abused and the abused were tracked and compared, after thirteen years 40 percent of the non-abused older people were still alive while only 9 percent of the physically abused older people were still alive. After making proper adjustments for factors that might affect mortality (age, gender, income, *etc.*) the researchers

---

[16] NATIONAL CENTER ON ELDER ABUSE, U.S. DEP'T OF HEALTH & HUMAN SERVICES, NATIONAL ELDER ABUSE INCIDENCE STUDY: FINAL REPORT §5-1 (1998), *available at* http://64.233.161.104/search?q=cache:Yi6wEOiW1dEJ:www.aoa.gov/eldfam/Elder_Rights/Elder_Abuse/ABuseReport_Full.pdf+National+Center+on+Elder+Abuse,+National+Elder+Abuse+Incidence+Study:+Final+Report+&hl=en.

[17] DAVIS & MEDINA-ARIZA, *supra* note 5, at 1 (citing Rosalie S. Wolf, *Elder Abuse and Neglect: An Update*, 7 REV. CLINICAL GERONTOLOGY 177-82 (1997)).

[18] *See* Wolf, *supra* note 3, *available at* http://www.generationsjournal.org/gen-24-2/intro.html (citing B.K. Booth, A.A. Bruno & R. Marin, *Psychological Therapy with Abused and Neglected Patients*, *in*, ABUSE, NEGLECT, AND EXPLOITATION OF OLDER PEOPLE: STRATEGIES FOR ASSESSMENT IN INTERVENTION (L. A. Baumhover & S. C. Beall ed., 1996); K. Solomon, *Victimization by Health Professions and the Psychologic Response of the Elderly*, *in*, ABUSE AND MALTREATMENT OF THE ELDERLY: CAUSES AND INTERVENTIONS (J. I. Kosberg, ed.1983).

determined mistreatment causes "extreme interpersonal stress that may confer additional death risk."[19/]

Law enforcement officials, who are charged with enforcing protective orders are the gatekeepers of the criminal justice system. They have an essential role in society's response to elder abuse by responding to and investigating instances of elder abuse and enforcing protective orders. However, protective orders are only effective when the restrained party is convinced that the order will be enforced. Unequivocal, standardized enforcement of court orders are essential to protect the older members of our society.[20/]

CONCLUSION

Elder abuse has profound consequences to its victims and our society as a whole. Many older people are unable to prevent further abuse when protective orders are violated and not enforced. Once a protective order is issued the older person becomes dependent upon law enforcement to enforce the order. Enforcement of protective orders can protect the oldest and most vulnerable portion of our society. Due to the fact that such a small percentage of elder abuse cases are actually reported, it is imperative that when an instance of elder abuse is reported and a protective order is granted that the order be enforced.

For the foregoing reasons, AARP respectfully requests that the Court affirm the judgment of the Court of Appeals for the Tenth Circuit.

19/ Wolf, *supra* note 3, *available at* http://www.generationsjournal.org/gen-24-2/intro.html (citing M.S. Lachs, et al., *The Mortality of Elder Abuse*, 280 J. AM. MED. ASS'N 428-32 (1998).

20/ OFFICE FOR VICTIMS OF CRIMES, U.S. DEP'T OF JUSTICE, ENFORCEMENT OF PROTECTIVE ORDERS 1 (Jan. 2002), *available at* http://www.ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin4/welcome.html.

February 10, 2005

Respectfully submitted,

Stuart R. Cohen*
Susan Ann Silverstein
Franco A. Munoz
AARP Foundation Litigation

Michael Schuster
AARP

601 E Street NW
Washington, DC 20049
(202) 434-2060

Counsel for *Amicus Curiae* AARP

* Counsel of record

Supreme Court U.S.
FILED
FEB 10 2005
OFFICE OF THE CLERK

No. 04-278

IN THE

Supreme Court of the United States

October Term, 2005

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHERYN GONZALES, AND LESLIE GONZALES

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

Brief *Amicus Curiae* of the American Civil Liberties Union and ACLU of Colorado, Hon. John J. Gibbons, Hon. Timothy K. Lewis, AALDEF, California Women's Law Center, National Asian Pacific American Women's Forum, National Partnership for Women & Families, Northwest Women's Law Center and Women's Law Project in Support of Respondent

---

Steven R. Shapiro
Lenora M. Lapidus
Emily J. Martin
Caroline Bettinger-Lopez
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2644

Caroline M. Brown
Counsel of Record
Joseph Zambuto, Jr.
Gregory M. Lipper*
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044
(202) 662-6000

Attorneys for *Amici Curiae*
*Admitted in California; not admitted in the District of Columbia. Supervised by principals of the Firm

TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 6

ARGUMENT 8

THE COURT OF APPEALS DID NOT CIRCUMVENT OR UNDERMINE *DESHANEY* WHEN IT CONCLUDED THAT JESSICA GONZALES CAN ASSERT A PROCEDURAL DUE PROCESS CLAIM AGAINST THE TOWN OF CASTLE ROCK 8

I. *DeShaney* Considered Only the Substantive Guarantees of the Due Process Clause, Which Are Sharply Distinct from Its Procedural Protections. 8

II. Ms. Gonzales's Claim Rests On The Particularized Obligations Set Forth In the Restraining Order, Not The Type of General Obligation Addressed in *DeShaney* 11

III. Unlike *DeShaney,* This Case Implicates Ms. Gonzales's Fundamental Right of Access To the Courts. 13

IV. *DeShaney* Does Not Bar Due Process Claims Where, as Here, Government Actors Have Placed Citizens At a Heightened Risk of Danger. 15

CONCLUSION 23

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Board of Regents v. *Roth*, 408 U.S. 564 (1972) 7

Boddie v. *Connecticut*, 401 U.S. 371 (1971) 11

Bounds v. *Smith*, 430 U.S. 817 (1977) 12

Bowers v. *DeVito*, 686 F.2d 616 (7th Cir. 1982) 14

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U.S. 673 (1930) 12

Caldwell v. *City of Louisville*, No. 03-5342, 2004 WL. 2829026 (6th Cir. Dec. 9, 2004) 16, 17

Collins v. City of Harker Heights, 503 U.S. 115 (1992)) 9

Cooper v. *Aaron*, 358 U.S. 1 (1958) 12

Currier v. *Doran*, 242 F.3d 905 (10th Cir. 2001) 14, 19

DeShaney v. *Winnebago County Department of Social Services*, 812 F.2d 298 (7th Cir. 1987) 13

DeShaney v. *Winnebago Cty. Department of Social Services*, 489 U.S. 189 (1989) ..... *passim*

Doe v. *Hillsboro Independent Sch. District*, 113 F.3d 1412 (5th Cir. 1997) 13

Dwares v. *City of New York*, 985 F.2d 94 (2d Cir. 1993) 13

Gazette v. *City of Pontiac*, 41 F.3d 1061 (6th Cir. 1994) 13

Gregory v. *City of Rogers*, 974 F.2d 1006 (8th Cir. 1992) 13

Hasenfus v. *LaJeunesse*, 175 F.3d 68 (1st Cir. 1999) 13

Hewitt v. *Helms*, 459 U.S. 460 (1983) 8

Kneipp v. Teddler, 95 F.3d 1199 (3d Cir. 1996) 14

L.W. v. *Grubbs*, 974 F.2d 119 (9th Cir. 1992) 19

Lawrence v. *Texas*, 539 U.S. 558 (2003) 8

Logan v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982) 11

Martin v. *Shawano-Gresham School District*, 295 F.3d 701 (7th Cir. 2002) 13

Munger v. *City of Glasgow Police Department*, 227 F.3d 1082 (9th Cir. 2000) 13

Nicini v. *Morra*, 212 F.3d 798 (3d Cir. 2000) 13

Perry v. *Sinderman*, 408 U.S. 593 (1972) 5

Plyer v. *Moore*, 100 F.3d 365 (4th Cir. 1996) 12

Powell v. *Alabama*, 287 U.S. 45 (1932) 12

Quill v., *United States*, 504 U.S. 298 (1992) 5

Sacramento v. *Lewis*, 523 U.S. 833 (1998) 7, 9

Schieber v. *City of Philadelphia*, 156 F. Supp. 2d 451 (E.D. Pa. 2001), *rev'd on other grounds* 14, 15, 20

Schieber v. *City of Philadelphia*, 320 F.3d 409 (3d Cir. 2003) 15

Sinthasomphone v. *City of Milwaukee*, 785 F. Supp. 1343 (E.D. Wis. 1992) 20

Tennessee v. *Lane*, 124 S. Ct. 1978 (2004) 11, 12

Washington v. *Glucksberg*, 521 U.S. 702 (1997) 7

Whren v. *United States*, 517 U.S. 806 (1996) 5

Zinermon v. *Burch*, 494 U.S. 113 (1990) 7

FEDERAL STATUTES

42 U.S.C. § 1983 3

STATE STATUTES

Colo. Rev. Stat. § 14-10-108 (2) 2, 10

Colo. Rev. Stat. § 18-6-803.5(3) 2, 10

Colo. Rev. Stat. § 18-6-803.7(2) 2

REPORTS AND ARTICLES

Caitlin E. Borgman, *Note, Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect DeShaney?*, 65 N.Y.U. L. Rev. 1280 (1990) 15, 19

Thomas A. Eaton & Michael Lewis Wells, *Governmental Inaction as a Constitutional Tort: DeShaney and its Aftermath,* 66 Wash. L. Rev. 107 (1991) 19

Barbara Hart, *Battered Women and the Criminal Justice System*, 36 Am. Behavioral Scientist 624 (1993) 16

Karla Fischer & Mary Rose, *When "Enough is Enough": Battered Women's Decision Making Around Court Orders of Protection*, 41 Crime & Delinquency 414 (1995) 15, 18

Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation,* 90 Mich. L. Rev. 1 (1991) 16

Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 Geo. Public Pol'y Rev. 51 (2000) 16

INTEREST OF AMICI CURIAE[1]

The *American Civil Liberties Union* (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 400,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae.* More specifically, the ACLU has frequently taken the position in a variety of contexts that the state is properly held liable when its own actions place identified and vulnerable individuals at increased risk of harm. Battered women who have obtained orders of protection fit easily within this category and have been a longstanding concern of the ACLU's Women's Rights Project, which was founded in 1972. The proper resolution of this case is therefore a matter of substantial interest to the ACLU and its members. The ACLU of Colorado is one of the ACLU's state affiliates.

The *Honorable John J. Gibbons* served as a judge on the United States Court of Appeals for the Third Circuit from 1970 to 1990, and as Chief Judge from 1987 to 1990.

The *Honorable Timothy K. Lewis*, Schnader Harrison Segal & Lewis, LLP, is a former Assistant United States Attorney, and served as a Judge for the United States District Court for the Western District of Pennsylvania and the United States Third Circuit Court of Appeals. He has long been

---

[1] Letters from petitioner and respondent indicating consent to file this brief are on file with the Clerk. Pursuant to Rule 37.6, no counsel for any petitioner or respondent authored this brief in whole or in part. Nor did any person or entity other than amici make a monetary contribution to the preparation or submission of this brief.

committed to ensuring due process rights for all Americans and the just and fair application of the law in all cases.

The *Asian American Legal Defense and Education Fund* (AALDEF), founded in 1974, is a non-profit organization based in New York City. AALDEF defends the civil rights of Asian Americans nationwide through litigation, legal advocacy and dissemination of public information. Many Asian Americans rely on police departments to enforce protective orders. The proper resolution of this case is therefore a matter of substantial interest to AALDEF.

The *California Women's Law Center* (CWLC) is a statewide, nonprofit law and policy center that works to ensure that life opportunities for women and girls are free from unjust social, economic and political constraints. In 1999, CWLC established its Murder at Home Project to advance legal, community and media responses to domestic violence and domestic violence homicide. The resolution of issues raised in this case has a significant impact on the enforcement of restraining orders. Therefore, CWLC has a compelling interest in this case.

Founded in 1996, the *National Asian Pacific American Women's Forum* (NAPAWF) is dedicated to forging a grassroots progressive movement for social and economic justice and the political empowerment of Asian Pacific American (APA) women and girls. Survivors of domestic violence in the APA community often confront barriers to receiving police protection, such as discrimination, language barriers, and fear of deportation. As a result, many APA women find the police less responsive to enforcing their protection orders against their abusers, and will often forgo seeking legal assistance altogether. The proper resolution of this case is therefore a matter of substantial interest to NAPAWF.

The *Northwest Women's Law Center* (NWLC) is a regional non-profit public interest organization that works to

advance the legal rights of all women. The NWLC serves as a regional expert on advancing the law to assist survivors of domestic and sexual violence. Of particular relevance to this case, the NWLC has led regional litigation efforts on behalf of victims of domestic and sexual violence who sought assistance from law enforcement but were not protected from further abuse. Therefore, NWLC has a compelling interest in this case.

The *Women's Law Project* is a non-profit feminist legal advocacy organization founded in 1974. Its mission is to abolish sex discrimination and the injustices created by gender stereotyping, and to advance the legal, health, and economic status of women and their families. The Law Project has represented domestic violence survivors and service agencies as plaintiffs or *amici curiae* in numerous cases, including *Schieber v. Philadelphia*, involving municipal liability under a state-created danger theory for police response to a deadly assault on a woman. The proper resolution of this case is therefore a matter of substantial interest to The Law Project.

STATEMENT OF THE CASE

On May 21, 1999, Respondent Jessica Gonzales obtained a temporary restraining order against her estranged husband, Simon Gonzales, who had a history of abusive and erratic behavior. On June 4, 1999, a state trial court issued a permanent restraining order after determining that Mr. Gonzales posed a threat of physical or emotional harm to his family. The restraining order was issued in accordance with the standards prescribed by state law, and commanded in part that Mr. Gonzales "not molest or disturb the peace of [Ms. Gonzales] or . . . any child." Pet. App. at 3a. The order excluded Mr. Gonzales from the family home and directed him to stay 100 yards away from the property at all times. *Id.*; *see also* Colo. Rev. Stat. § 14-10-108(2)(c) (party can be excluded from family home upon a showing that physical or

emotional harm would otherwise result). Mr. Gonzales was permitted to visit with his children on alternate weekends, for two weeks during the summer, and, with advance notice to Ms. Gonzales, once a week for dinner. *Id.* at 5a.

The order included a statement instructing law enforcement officials that they

> shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of the restrained person when you have information amounting to probable cause that the restrained person has been properly served with a copy of this order or has received actual notice of the existence of this order.

Pet. App. at 17a. Officers were directed to enforce the order "even if there is no record of it in the restraining order central registry." *Id.* Finally, the order commanded that the officers "shall take the restrained person to the nearest jail or detention facility utilized by your agency." *Id.* Each of these mandates reflected the obligations imposed on peace officers by state law. *See* Colo. Rev. Stat. § 18-6-803.5(3)(b) (peace officer "shall arrest" or seek a warrant for arrest "when the peace officer has information amounting to probable cause" that a restraining order has been violated).

The order was served on Mr. Gonzales by local officials and was entered into the State's central registry. *See* Colo. Rev. Stat. § 18-6-803.7(2)(b). Less than three weeks after the permanent order was issued, Mr. Gonzales took his three daughters from their home without prior arrangement and without their mother's knowledge—in clear violation of the order's terms. Pet. App. at 5a. After Ms. Gonzales discovered that her daughters were missing, she called the Castle Rock Police Department for assistance. Two officers came to her home shortly after 7:30 pm, reviewed the restraining order, and informed Ms. Gonzales that there was nothing they could do. They told her to call back after 10:00

pm if the children had not been returned home. At 8:30 pm, Ms. Gonzales reached Mr. Gonzales on his cell phone and learned that he and the children were at an amusement park in Denver. Ms. Gonzales immediately called the police, told them where to find Mr. Gonzales and the children, and again asked them to arrest him for violating the restraining order. Again, the officers declined to take any action. When she called a third time shortly after 10:00 pm, the police dispatcher told her to wait until midnight. At 12:50 am, after yet another call for assistance had gone unanswered, Ms. Gonzales drove to the police station. An officer took an incident report but made no attempt to locate Mr. Gonzales or enforce the restraining order. Pet. App. at 5a-6a. He instead left for dinner. Pet. App. at 5a.

At 3:20 am, Mr. Gonzales drove to the Castle Rock Police Station and opened fire with a semi-automatic weapon he had purchased shortly after abducting his children. He was shot dead at the scene. The police officers later discovered his three murdered daughters in the cab of his truck. Pet. App. at 6a.

Individually and on behalf of her deceased children, Ms. Gonzales filed an action in the United States District Court for the District of Colorado under 42 U.S.C. § 1983 against the Town of Castle Rock and three of its police officers, alleging violations of the Fourteenth Amendment's guarantee of due process of law. The district court dismissed the action pursuant to Fed. R. Civ. P. 12(b)(6). Pet. App. at 113a. On appeal, a panel of the Court of Appeals for the Tenth Circuit affirmed the district court's dismissal of her claim as to the substantive component of the Due Process Clause, but reversed the district court's ruling that Ms. Gonzales had failed to state a claim for a violation of procedural due process. Pet. App. at 99a. On rehearing en banc, the Tenth Circuit held that Ms. Gonzales was entitled to proceed against the Town of Castle Rock on her procedural due process claim, but ruled that the individual police officers

were entitled to the defense of qualified immunity. Pet. App. at 1a-94a.

On November 1, 2004, this Court granted the Town of Castle Rock's petition for writ of certiorari.

SUMMARY OF ARGUMENT

The Court of Appeals correctly held that respondent Jessica Gonzales had stated a claim for relief by asserting that petitioner's duty to enforce the restraining order against her estranged husband created a property interest under Colorado law, and that petitioner's utter failure to enforce that order without meaningful consideration or explanation violated even the most minimal notions of procedural due process. Like the Tenth Circuit's dissenting judges, petitioner primarily and persistently claims that this decision "circumvents," "overrules," and "undermines" this Court's holding in *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989), which held that the substantive guarantees of the Due Process Clause do not generally require the government to protect an individual from third-party violence. *See, e.g.*, Pet. Br. at i, 15, 20. Petitioner's belief that *DeShaney* provides the appropriate reference point is misguided and flawed, for a number of reasons.

First, *DeShaney* was a substantive due process case, while this Court is reviewing Jessica Gonzales's claim for procedural due process. The interests protected by the substantive and procedural contours of the Due Process Clause are distinct and, correspondingly, the frameworks for analysis are not the same for both. It is often true that a claim improperly asserted under one constitutional provision may still present a valid issue under a different constitutional guarantee. *See, e.g., Whren v. United States*, 517 U.S. 806 (1996); *Quill v. United States*, 504 U.S. 298, 313 (1992), *Perry v. Sinderman*, 408 U.S. 593, 598 (1972). In this case,

respondent raised two separate claims under the Due Process Clause: one substantive and one procedural. Contrary to petitioner's contention, respondent's substantive and procedural due process claims do not rise and fall together.

Second, while *DeShaney* rejected the argument that the Due Process Clause imposes a general, affirmative obligation on the government to protect the life, liberty, and property of its citizens from the actions of third parties, it did not consider a situation in which a court's specific findings trigger specific statutory requirements that such protection be provided.

Third, and relatedly, the holding in *DeShaney* did not impact the unique constitutional role accorded to the courts, nor did it disturb the long line of cases protecting an individual's fundamental right of access to the courts. Ms. Gonzales's due process claim, rooted in the restraining order granted by the state court, thus stands apart from *DeShaney*'s analytical framework.

Finally, *DeShaney* recognized that the government can through its own actions assume an obligation to protect individuals from third-party violence. Describing the dangers that Joshua DeShaney faced from his father, the Court noted that the state "played no part in their creation, nor did it do anything to render him any more vulnerable to them." 489 U.S. at 201. The same cannot be said here. Notwithstanding a specific judicial finding that Mr. Gonzales posed a threat to his wife and children, and the issuance and service of an order that notified police of their statutory obligation to take certain specific actions should the order be violated, the police shirked their responsibility and thus left Ms. Gonzales and her children at increased risk of violence. For these reasons, the decision below neither contradicts nor undermines this Court's holding in *DeShaney*.

ARGUMENT

THE COURT OF APPEALS DID NOT CIRCUMVENT OR UNDERMINE *DESHANEY* WHEN IT CONCLUDED THAT JESSICA GONZALES CAN ASSERT A PROCEDURAL DUE PROCESS CLAIM AGAINST THE TOWN OF CASTLE ROCK.

I. *DeShaney* Considered Only the Substantive Guarantees of the Due Process Clause, Which Are Sharply Distinct from Its Procedural Protections.

In *DeShaney*, this Court emphasized that the claim under consideration was **not** "that the State denied [the petitioner] protection without according him appropriate procedural safeguards" but rather "that it was categorically obligated to protect him in these circumstances." 489 U.S. at 195 (citations omitted). Although the Court rejected the latter, substantive claim, it explicitly declined to address the former, and it is precisely that type of procedural claim that Ms. Gonzales asserts here. *See id.* at 195 n.2. The express reservation of the procedural issue in *DeShaney* underscores the petitioner's error in assuming that the Court's analysis in that case forecloses Ms. Gonzales's claim that government officials violated her Fourteenth Amendment right to procedural due process.

Petitioner's assumption contradicts this Court's repeated guidance that the substantive and procedural guarantees of the Due Process Clause serve discrete purposes and are subject to distinct analyses. This Court has repeatedly construed the Due Process Clause to cover both a "'guarantee [of] fair process'" and "a substantive sphere as well." *Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997)). The substantive sphere protects "certain fundamental rights and

liberty interests" from government interference through either statutory or executive action, "regardless of the fairness of the procedures used to implement them." *Id.* at 840. The procedural component, by contrast, transcends "fundamental" rights to include interests "created and . . . defined by . . . an independent source such as state law," *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). "In procedural due process claims, the deprivation by state action of a[n] . . . interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*"—that is, without adequate procedures. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (internal citations omitted) (emphasis in original).

While Ms. Gonzales's procedural and substantive due process claims arise from the same basic set of facts, the interests for which constitutional protection is claimed is distinct. The substantive claim she initially raised—which the Court of Appeals held was foreclosed by *DeShaney* (incorrectly, we believe, *see infra* Parts II-IV)—sought redress for the loss of her children's lives. Her procedural claim, by contrast, stems from the legislatively- and judicially-created property interest in enforcement of the restraining order: the state statute governing protective orders, and the specific order issued to Ms. Gonzales, granted her an entitlement that local officers would enforce the order when certain circumstances, alleged to be present in her case, arose. The procedural claim thus implicates the police department's washing its hands of the order, without procedures sufficient to ensure that its decision was the result of a fair process. Ms. Gonzales's interest in being provided fair procedures before the police deprived her of her property interest in the order's enforcement is constitutionally distinct from Ms. Gonzales's substantive interest in preventing the tragic results that flowed from their failure to do so.

Petitioner's contention that acceptance of Ms. Gonzales's procedural claim "circumvents" the holding in

DeShaney ignores the distinction between the two types of interests protected by the Due Process Clause, and the different constitutional analyses to which they are subject. It is often the case that an interest protected by the procedural component of the Due Process Clause is **not** a fundamental right that triggers the Clause's substantive guarantees, *see e.g., Hewitt v. Helms,* 459 U.S. 460, 471 (1983), or that government action is found to violate substantive due process protection, even when adequate procedures were in place. *See, e.g., Lawrence v. Texas,* 539 U.S. 558 (2003). The tests used by the Court in evaluating the two types of claims are quite distinct, and as *DeShaney* itself makes clear, the Court engaged only in a substantive analysis in deciding that case.

Petitioner's error in conflating the different legal frameworks is underscored by comparing the procedural analysis employed by the court below with that applicable to substantive due process claims. In addressing Ms. Gonzales's procedural due process claim, the Tenth Circuit first concluded that the right to police enforcement of the order "fits within the other types of *Roth* entitlements acknowledged by the Supreme Court and is properly deemed a property interest" that was subject to due process protections, *see* Pet. App. at 28a, and then held that Ms. Gonzales had stated a claim by alleging that the Castle Rock police officers denied her "the opportunity to be heard at a meaningful time and in a meaningful manner" before refusing to enforce the order, *see id.* at 30a. In establishing what process was due, the Tenth Circuit followed this Court's precedents to balance Ms. Gonzales's interest in having the order enforced, the risk of an erroneous deprivation, the use of additional safeguards that would have aided in preventing a wrongful deprivation, and the fiscal or administrative burden that the additional procedural requirements would entail. *Id.* at 38a-41a.

Ms. Gonzales's substantive due process claim, had it proceeded, would have presented two very different questions: (1) whether there was a deprivation of a constitutionally

protected fundamental right or liberty interest; and (2) whether the challenged official conduct was "'arbitrary in the constitutional sense.'" *See Lewis*, 523 U.S. at 846 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 129 (1992)). In a case such as this one challenging executive abuse of power, the "cognizable level" of arbitrary action is "that which shocks the conscience." *Lewis*, 523 U.S. at 846. This standard is not a "calibrated yard stick," *id.* at 847, and "duplicates no traditional category of common-law fault." *Id.* at 848.

As set forth in the opinion of the Tenth Circuit and in her brief to this Court, Ms. Gonzales has properly pled a procedural due process claim challenging the police failure to provide adequate procedural safeguards (or any procedural safeguards) in refusing to enforce the restraining order—an entitlement conferred upon her by state law and judicial order. That claim is independent of any potential substantive claim that state actors engaged in reckless and willful misconduct that resulted in the murder of her three young daughters.

II. Ms. Gonzales's Claim Rests On The Particularized Obligations Set Forth In the Restraining Order, Not The Type of General Obligation Addressed in *DeShaney*.

The court-issued restraining order and the statutory provisions for mandatory arrest, the terms of which are reflected in the order's notice, stand in stark contrast to the situation considered in *DeShaney*. That case stands for the proposition "[a]s a general matter" that "a State's failure to protect an individual against private violence . . . does not constitute a violation of the Due Process Clause." 489 U.S. at 197. In this case, however, the restraining order was predicated on a judicial determination that Mr. Gonzales posed a threat of physical or emotional harm to his family. Pet. App. at 3a (restraining order); Colo. Rev. Stat. § 14-10-108 (2)(C) (1999). The state court had thus formally

recognized the danger to the Gonzales family. No such finding took place in *DeShaney*. There, the sole judicial determination was that Joshua DeShaney should be returned to the custody of his father. *See* 489 U.S. at 192.

Moreover, the caseworkers who intermittently visited the DeShaney home enjoyed wide discretion to choose (or, regretfully, to fail to choose) an appropriate course of action for Joshua. In contrast, the restraining order prescribed continuing duties on the part of law enforcement that were not a matter of discretion, thus creating a wholly different form of relationship with Ms. Gonzales, the holder of the order. Upon a showing of probable cause that Mr. Gonzales had breached the order, the police officers were required to arrest him (or, if impractical, issue a warrant for his arrest). Pet. App. at 4a (notice to law enforcement officials on reverse side of restraining order); Colo. Rev. Stat. § 18-6-803.5 (3)(b) (1999). The police had no discretion to ignore the statute, the court's findings that Mr. Gonzales posed a threat to his wife and family, the court's notice of their statutory obligations, or Ms. Gonzales's repeated calls for enforcement.

Holding the Town of Castle Rock accountable for the failure to perform what was required under the order is therefore entirely consistent with *DeShaney*. By virtue of the court-issued restraining order, the government stepped into the fray between Ms. Gonzales and her estranged husband. It placed its imprimatur on the framework that would govern their interactions (*e.g.*, weekend parenting time, mid-week dinner visits with notice, etc.), *see* Pet. App. at 5a, and voluntarily obligated itself to aid the Gonzales family should Mr. Gonzales depart from that framework. Unlike *DeShaney*, where the Court declined to impose on the government a duty that was not already in place, *see* 489 U.S. at 189, this case involves the government's arbitrary failure to live up to a duty that arose out of its own affirmative acts; a duty that was directed toward particular individuals and strictly defined by the terms of the restraining order.

III. Unlike *DeShaney*, This Case Implicates Ms. Gonzales's Fundamental Right of Access To the Courts.

This case also implicates fundamental rights that were not at issue in *DeShaney*. *DeShaney* concerned only Joshua's liberty interest in "freedom from ... unjustified intrusions on personal security," 489 U.S. at 195, and it concluded that on the facts of that case, the state could not be held responsible for the infringement of that interest. While this case implicates similar liberty interests, also at stake is Ms. Gonzales's fundamental right of meaningful access to the courts, a right protected by the Due Process Clause. *Tennessee v. Lane,* 124 S. Ct. 1978, 1988 (2004); *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982); *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971). Implicit in this core constitutional value is that any judgment obtained shall be enforced or, at least, shall not be undone by arbitrary executive action.

Though in many respects the Constitution may be a "charter of negative rather than positive liberties," *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 812 F.2d 298, 301 (7th Cir. 1987), with respect to the role of state courts, it expressly imposes a number of affirmative obligations upon the government. *See, e.g.*, U.S. Const. art. IV, § 1, cl. 1 (full faith and credit to the laws and judgments of other states); U.S. Const. amend. VI (speedy and public trials, compulsory process, assistance of counsel); U.S. Const. amend. VII (duty to preserve civil trial by jury). These textual obligations trigger corollary obligations directly under the Due Process Clause. *See, e.g., Powell v. Alabama*, 287 U.S. 45, 72 (1932) (holding that due process requires, as a "logical corollary from the constitutional right to be heard by counsel," that state trial courts provide counsel for indigent criminal defendants).

Of particular relevance to this case, "a State must afford to all individuals a meaningful opportunity to be heard

in its courts." *Lane*, 124 S. Ct. at 1981. Moreover, the Court has construed the Due Process Clause to preserve this fundamental right of access to the courts in fact as well as in theory. *See id.* (listing obligations, including state duty to waive filing fees in certain criminal and civil cases; to provide transcripts at state expense; to appoint counsel on direct felony appeals); *see also Bounds v. Smith*, 430 U.S. 817 (1977) (cataloguing additional obligations arising from the right of access to the courts).

Among the obligations implicit in the Constitution's promise of meaningful access to the courts is a government duty to ensure that court orders and judgments are respected and enforced. *See, e.g., Plyer v. Moore*, 100 F.3d 365, 373 (4th Cir. 1996) ("We have little trouble accepting the proposition that the right of access to the courts necessarily includes the right to enforce a judgment once it is obtained."); *cf. Brinkerhoff-Faris Trust & Savs. Co. v. Hill*, 281 U.S. 673, 682 (1930) (observing that due process requires the States to provide "some real opportunity" for individuals to protect and enforce their rights). "Due process" is meaningless if the end result of such process—a court order—is of no force or effect. *Cf. Cooper v. Aaron*, 358 U.S. 1 (1958).

In this instance, Ms. Gonzales's only meaningful opportunity to enforce the restraining order was to call upon police officers to perform their duties. For one, "the crowded nature of state court dockets, and the difficulty of getting persons who violate court orders in front of a judge, motivated the Colorado General Assembly, in part, in its crusade against domestic violence to create an additional enforcement mechanism." *See* Brief of *Amici Curiae* Int'l Municipal Lawyers Assoc. and Nat'l League of Cities *et al.* at 6. More fundamentally, the kidnapping of respondent's children by her husband created an emergency situation that could not be remedied by later hauling the kidnapper into court on contempt charges. In situations like the one confronting Ms. Gonzales, a timely police response may be the only realistic

way for a restraining order to be enforced. Petitioner's alleged policy or custom of refusing to enforce restraining orders duly issued by state courts thus presents a due process claim that was neither raised nor addressed by *DeShaney*.

IV. *DeShaney* Does Not Bar Due Process Claims Where, as Here, Government Actors Have Placed Citizens At a Heightened Risk of Danger.

DeShaney also does not control in the present circumstances because, unlike *DeShaney*, the government's actions affirmatively subjected Ms. Gonzales and her children to increased danger. This Court in *DeShaney* explained that "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." 489 U.S. at 201. The State was immune from liability in that instance because it had merely acquiesced in—but not contributed to—the victim's danger. Conversely, the Courts of Appeals have overwhelmingly recognized that *DeShaney* does not control if state actors either created or exacerbated the danger faced by an individual.[2] This "state-created danger" exception to *DeShaney*'s general rule vindicates the principle originally articulated by Judge Posner: "If the state puts a man in a position of danger from private persons and then fails to

---

[2] *See, e.g., Martin v. Shawano-Gresham School Dist.*, 295 F.3d 701, 708 n.7 (7th Cir. 2002); *Nicini v. Morra*, 212 F.3d 798, 807 n.6 (3d Cir. 2000) (en banc); *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1087 (9th Cir. 2000); *Hasenfus v. LaJeunesse*, 175 F.3d 68, 73 (1st Cir. 1999); *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412, 1415 (5th Cir. 1997); *Gazette v. City of Pontiac*, 41 F.3d 1061, 1065 (6th Cir. 1994); *Dwares v. City of New York*, 985 F.2d 94, 98-99 (2d Cir. 1993); *Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992).

protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit." *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

Courts have recognized, for example, that *DeShaney* does not foreclose a due process claim when a police officer stopped a pedestrian who was walking home intoxicated on a cold winter night, told her companion that he was free to go, and then left her to continue to make her way home alone. *Kneipp v. Teddler*, 95 F.3d 1199, 1209 (3d Cir. 1996). In that case, the court held that the intervention of government actors left the individual more vulnerable than she otherwise would have been. Likewise, *DeShaney* was determined not to bar a claim against a state officer who told a mother to stop making allegations of child abuse ~~against~~ her children's father because these allegations were traumatizing the children. *Currier v. Doran*, 242 F.3d 905, 921-22 (10th Cir. 2001). The court found that the official's discouragement increased the children's vulnerability to abuse. *Id.* Similarly, the general rule in *DeShaney* was not applied when police responded to a 911 call reporting screams from an apartment; knocked on the apartment door; and took no action when no response ensued other than instructing neighbors to call 911 again if they heard further noises. *Schieber v. City of Philadelphia*, 156 F. Supp. 2d 451 (E.D. Pa. 2001). The court in that case concluded that the police enhanced the danger to the individual inside the apartment by making it less likely that the neighbors would otherwise intervene. *Id.*[3]

---

[3] On appeal, the Third Circuit found that the plaintiffs had nevertheless failed to establish a violation of due process because they had failed to demonstrate the requisite culpability on behalf of the police—that is, the behavior of the police was not deliberately indifferent and so did not shock the conscience. *Schieber v. City of Philadelphia*, 320 F.3d 409 (3d Cir. 2003). This is a separate component of substantive due process analysis, distinct from the (continued...)

Restraining orders can be, and are, a source of vital protection to the women and families who seek them. For many, the mere availability of police enforcement is sufficient to stop the harassing or abusive behavior; for some, the fact of police enforcement is a necessity. The protection afforded by these orders loses its potency, however, if they are not backed by meaningful, principled enforcement at the local level. The failure to enforce orders not only means that the government delivers less than is promised, but it can actually exacerbate the danger that drives women to seek such orders in the first place. Unfortunately, "the issuance of an order of protection results in a high likelihood of retaliation by the batterer." Caitlin E. Borgman, Note, *Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect DeShaney?*, 65 N.Y.U. L. Rev. 1280, 1308 (1990). The possibility of post-order abuse is even greater for women, like Ms. Gonzales, who have custody of the children. U.S. Department of Justice, National Institute of Justice, Legal Interventions in Family Violence: Research Findings and Policy Implications 50 (1998).

Domestic violence victims such as Ms. Gonzales "are most likely to be killed while taking steps to end the relationship with the abuser or while seeking help from the legal system," Deborah Epstein, et al., *Confronting Domestic Violence and Achieving Gender Equality: Evaluating* Battered Women & Feminist Lawmaking *by Elizabeth Schneider*, 11 Am. U. J. Gender Soc. Pol'y & L. 465, 476 (2003), and a restraining order implicates both risk-factors. First, the act of seeking an order of protection is generally a signal that the marriage or relationship is ending. *See* Karla Fischer & Mary Rose, *When "Enough is Enough": Battered Women's Decision Making Around Court Orders of Protection*, 41

---

question of whether any constitutionally protected interest is implicated at all.

Crime & Delinquency 414, 418 (1995). This separation often provokes retaliatory violence. *See* Ronet Bachman & Linda E. Saltzman, U.S. Department of Justice, Violence Against Women: Estimates from the Redesigned National Crime Victimization Survey (1995); Desmond Ellis & Walter S. DeKeseredy, Marital Status and Woman Abuse: the Dad Model (1989); *see generally* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich. L. Rev. 1 (1991) (explaining dynamics and prevalence of separation assault).

Second, the mere fact that a woman seeks protection in court may well motivate her batterer to retaliate. *See* Michelle R. Waul, *Civil Protection Orders: An Opportunity for Intervention with Domestic Violence Victims*, 6 Geo. Public Pol'y Rev. 51, 56 (2000). In some instances, the batterer will use violence to pressure his victim to keep him out of trouble with law enforcement. *See* Barbara Hart, *Battered Women and the Criminal Justice System*, 36 Am. Behavioral Scientist 624, 626 (1993) (documenting, in the analogous context of criminal prosecution, that "[b]atterers may, in fact, escalate their violence to . . . coerce her into seeking termination of the prosecution."). Moreover, the batterer will often view the restraint of his relationship by the court as a loss of control over his victim. Because "the struggle to control the woman . . . lies at the heart of battering," Mahoney, *supra*, at 56, an abuser such as Mr. Gonzales may have felt motivated to use violence to reassert his control that had been stripped by his wife's resort to the courts.

Accordingly, the protective order granted by the State and served on her estranged husband exposed Ms. Gonzales to a risk of retaliatory violence against herself and her children, and the order, pursuant to state statute, appropriately tasked the police with mitigating that risk. A similar situation was presented in *Caldwell v. City of Louisville*, No. 03-5342, 2004 WL 2829026 (6th Cir. Dec. 9, 2004), in which the Court of Appeals held that a municipality would be liable under the

Fourteenth Amendment if it was deliberately indifferent to a domestic violence victim's safety after it increased the risk that she would be abused. In that case, the police had encouraged a battered woman to file a criminal complaint against her boyfriend that eventually led to his arrest, but then had—for no reason—failed to rearrest the abuser after learning that he had mistakenly been released. *See id.* at *1-2. While the unexecuted arrest warrant lingered, the abuser strangled and killed the woman. *Id.* at *2. The court held that the city "undertook some affirmative conduct which ultimately increased [the victim's] harm," *id.* at *6, relying on expert opinion that "[p]erpetrators of domestic violence are known to be more likely to increase the frequency and severity of their abuse in the period immediately after the victim seeks assistance from the Criminal Justice System." *Id.* at *9 n.7 (internal quotations omitted). This expert—a former police chief with over twenty-five years experience as an officer—elaborated that abusers are often more dangerous after government intervention because they "try to reassert their power and control over the victim." *Id.* (internal quotations omitted).

Thus, when women such as Jessica Gonzales seek refuge from their batterers, they must weigh the possibility of increased violence against the symbolic and practical protection that a restraining order could provide. In making the decision to seek the order, one can assume that Ms. Gonzales took the order at face value and relied on the State's promise that law enforcement officials would assist her:

> NOTICE TO LAW ENFORCEMENT OFFICIALS: YOU SHALL USE EVERY REASONABLE MEANS TO ENFORCE THIS ORDER. YOU SHALL ARREST, OR, IF AN ARREST WOULD BE IMPRACTICAL UNDER THE CIRCUMSTANCES, SEEK A WARRANT FOR THE ARREST OF THE RESTRAINED PERSON WHEN YOU HAVE

> INFORMATION AMOUNTING TO PROBABLE CAUSE THAT THE RESTRAINED PERSON HAS VIOLATED ... ANY PROVISION OF THIS ORDER.... YOU SHALL ENFORCE THIS ORDER EVEN IF THERE IS NO RECORD OF IT.... YOU ARE AUTHORIZED TO USE EVERY REASONABLE EFFORT TO PROTECT THE ALLEGED VICTIM AND THE ALLEGED VICTIM'S CHILDREN TO PREVENT FURTHER VIOLENCE.

In believing that the State meant what it said in promising enforcement of the order, Ms. Gonzales would have been by no means atypical. One study of battered women seeking protective orders found that even though 86 percent of them believed that their assailant would violate the order, a full 95 percent were confident that the police would respond rapidly to these violations. Fischer & Rose, *supra*, at 417.

Ms. Gonzales's decision to seek the order was thus bound up with "the belief that some outside intervention would be available to" her, *id.*, even as the threat of violence in her life remained. The calculation that a woman must make in determining whether a protective order will enhance or compromise her safety is thus directly affected by representations that local law enforcement will enforce it. When that promise is unfulfilled, the issuance and service of a protective order itself heightens a woman's vulnerability. As the Department of Justice has recognized, "[u]nless protective orders are enforced, they can prove harmful to victims by creating a false sense of security." U.S. Department of Justice, Office for Victims of Crime, Enforcement of Protective Orders 5 (2002). For "[a] woman who has not received an order of protection and still believes herself to be in grave physical danger is more likely to seek other help than a woman who believes she will be protected by the state." Borgman, *supra*, at 1309.

Accordingly, it is a "familiar" example of state-created danger when the State "induc[es] someone to rely on state protection and then fail[s] to provide it." Thomas A. Eaton & Michael Lewis Wells, *Governmental Inaction as a Constitutional Tort:* DeShaney *and its Aftermath*, 66 Wash. L. Rev. 107, 126 (1991). Had the government not led Ms. Gonzales to believe that the order would be enforced, she may have felt compelled to undertake more drastic self-help, such as changing her residence, job, or schedule; arranging for constant close supervision of her children; going into hiding; or "fleeing her home to seek protection at a shelter or with relatives or filing a criminal complaint to have the batterer prosecuted." *Borgman, supra*, at 1309. Although Ms. Gonzales might have felt that an enforced order was preferable to these more drastic and life-interrupting steps, undoubtedly she would have taken them if she felt that they were necessary to protect her own and her children's safety. *See L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992) (substantive due process violation resulting from inmate's rape of female prison guard; victim unprepared to defend or protect herself "because she had not been informed at hiring that she would be left alone with violent offenders.").

The police further enhanced the danger to Ms. Gonzales's daughters after her children were kidnapped. Rather than admitting that they would not enforce the order, the police repeatedly told Ms. Gonzales to wait for the return of her daughters, to call back later, or to wait for further police action that never materialized. Had they forthrightly refused to help her at the outset, Ms. Gonzales may well have taken other steps to protect her children: she might have looked for them herself, enlisted the aid of friends and other family, or perhaps even sought out a private investigator. *See, e.g.*, *Currier*, 242 F.3d at 922 (child protection worker increased danger by "discourag[ing] [mother] from seeking the help of other [child protective service] employees or other governmental sources of help such as the police."); *Schieber v. City of Philadelphia*, 156 F. Supp. 2d at 459, *rev'd on other*

grounds, 320 F.3d 409 (3d Cir. 2003) (police increased danger by failing to act after responding to scene of 911 call because their arrival made neighbors less likely to intervene on behalf of victim); *Sinthasomphone v. City of Milwaukee*, 785 F. Supp. 1343, 1349 (E.D. Wis. 1992) (police increased danger when soon-to-be murdered teenager left in custody of serial killer Jeffrey Dahmer; concerned citizen who subsequently called the police station assured by police that "everything was under control").

In sum, and in contrast to *DeShaney*, the government actors in this case increased the danger faced by Ms. Gonzales and her children by undertaking certain obligations to protect her and then repeatedly failing to fulfill these obligations. *DeShaney* also did not involve the type of mandatory obligations imposed by the Colorado state statute and particularized by the court order issued to Ms. Gonzales. Nor did *DeShaney* purport to address—indeed, it specifically reserved—the type of procedural due process claim advanced here. For all of these reasons, *DeShaney* does not foreclose respondent's claim that the Town of Castle Rock should be held liable for failing to provide adequate process before disobeying the court's command to protect her and her children.

CONCLUSION

For the foregoing reasons and those set forth in the Brief of Respondent Jessica Gonzales, the decision of the Tenth Circuit should be affirmed.

Respectfully Submitted,

Steven R. Shapiro
Lenora M. Lapidus
Emily J. Martin
Caroline Bettinger-Lopez
American Civil Liberties
Union Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2644

Caroline M. Brown
Counsel of Record
Joseph Zambuto, Jr.
Gregory M. Lipper*
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044
(202) 662-6000

Attorneys for *Amici Curiae*
*Admitted in California; not admitted in the District of Columbia. Supervised by principals of the Firm

Supreme Court, U.S.
FILED
DEC 23 2004
OFFICE OF THE CLERK

(7)

No. 04-278

IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHERYN GONZALES, AND LESLIE GONZALES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

BRIEF OF *AMICUS CURIAE* THE DENVER POLICE PROTECTIVE ASSOCIATION, THE PEACE OFFICERS RESEARCH ASSOCIATION OF CALIFORNIA LEGAL DEFENSE FUND, AND THE COLORADO ASSOCIATION OF CHIEF'S OF POLICE IN SUPPORT OF PETITIONER

Julie C. Tolleson
Kennedy Christopher Childs & Fogg, PC
1050 17th Street, Suite 2500
Denver, Colorado 80265
Telephone: (303) 825-2700

David J. Bruno
Counsel of Record
Jeffrey J. Clayton
Michael T. Lowe
Bruno, Bruno, & Colin, P.C.
1560 Broadway, Suite 1099
Denver, CO 80220
(303) 831-1099

Counsel for Amicus Curiae The Denver Police Protective Association and The Peace Officers Research Association of California Legal Defense Fund, and The Colorado Association of Chief's of Police

QUESTIONS PRESENTED

1. Whether, in conflict with decision of the Sixth, Seventh, Eighth, and D.C. Circuits, the Tenth Circuit's decision permitting a *procedural* due process claim against a local government for its failure to protect the holder of a partial restraining order from private violence, so circumvents as to effectively repudiate this Court's holding in *DeShaney* rejecting a similar *substantive* due process claim?

2. If the Fourteenth Amendment's Due Process Clause is read to permit, via its procedural aspects, the same substantive claims already rejected by this Court in *DeShaney*, what kind of process is required for police inaction with respect to a partial restraining order *not* to violate the constitution?

PARTIES TO THE PROCEEDING

Petitioner: Town of Castle Rock, Colorado, a Colorado home rule municipal corporation.

Respondent: Jessica Gonzales, individually and as next friend of her deceased minor children Rebecca Gonzales, Katheryn Gonzales, and Leslie Gonzales.

Other Defendants Below: Aaron Ahlfinger, Robert S. Brink, and Marc Ruisi, current or former members of the Town of Castle Rock Police Department.

Amici Curiae Below: Colorado Municipal League; Colorado Counties, Inc.; and Colorado Association of Chiefs of Police.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES v
INTEREST OF *AMICUS CURIAE* 1
SUMMARY OF ARGUMENT 4
ARGUMENT 6
I. Plaintiffs Had No Property Interest Under the Statute and Protective order, and Thus Plaintiffs Failed to State a Claim Under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. 6
A. The Holding of the Court of Appeals Is Inconsistent With *DeShaney* and Creates an Incentive for State and Local Governments to Eliminate Similar Mandatory Statutes, Which Result Would Hamper the Delivery of Public Services 6
B. Police Officers Have Discretion Under C.R.S. § 18-6-803.5 and the Court Order to Decide Whether to Arrest and When to Seek a Warrant, Thus Negating Any Reasonable Expectation of Enforcement of the Order Sufficient to be Termed Property Under *Roth* 8
C. The Claim Must be Dismissed Because the Alleged Violation of the Fourteenth Amendment By Officers Was No More than a Negligent Omission 12
D. The Legislative History of the Act Supports the Conclusion that the General Assembly Did Not Intend to Create a Property Right in Restraining

Order Enforcement 14

II. Assuming, *arguendo*, Plaintiffs Established That a Property Right Was Denied by Town of Castle Rock Officers, Plaintiffs Received All of the Process They Were Due Under the Constitution 15

TABLE OF AUTHORITIES

CASES

Board of Pardons v. Allen, 107 S.Ct. 2415, 2423 (1987) 8

Board of Regents v. Roth, 408 U.S. 564 (1972) 4, 12

Daniels v. Williams, 474 U.S. 327, 330 (1986) 12, 13

Davidson v. Cannon, 474 U.S. 344, 348 (1986) 12, 13

DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 191 (1989) ..... passim

Fuentes v. Shevin, 407 U.S. 67, 81 (1972) 15

Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970) 4

Hewitt v. Helms, 459 U.S. 460 (1988) 8

Matthews v. Eldridge, 424 U.S. 319, 348 (1976) 15

Monell v. New York City Dept. of Social Servs., 436 U.S. 658 (1978) 6

Olim v. Wakenekona, 461 U.S. 238 (1983) 8

People v. Vigil, 729 P.2d 360, 365-66 (Colo. 1986) 10

Perry v. Sindermann, 408 U.S. 593 (1972) 4

Union Pac. R. Co. v. Woodahl, 308 F.Supp. 1002, 1008 (Mont. 1970) 11

STATUTES

C.R.S. § 16-3-106 10

C.R.S. § 24-10-101, *et seq* 14

C.R.S. § 24-10-106 14

OTHER AUTHORITIES

1987 WL 880162 (Brief of *Amicus Curiae* The National School Boards Association in Support of Respondents submitted in *DeShaney*) 3

Charles A. Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 YALE L.J. 1245, 1255 (1965) 4

Charles A. Reich, The New Property, 73 YALE L.J. 733, 787 (1964) 4, 5

Complaint 11, 22, 23

TREATISES

BLACK'S LAW DICTIONARY (6th Ed. 1990) 12

Erwin Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (1997) 8, 9

No. 04-278

IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHERYN GONZALES, AND LESLIE GONZALES,

Respondent.

On Writ of Certiorari from the United States Court of Appeals For the Tenth Circuit

BRIEF OF *AMICUS CURIAE* THE DENVER POLICE PROTECTIVE ASSOCIATION, THE PEACE OFFICERS RESEARCH ASSOCIATION OF CALIFORNIA LEGAL DEFENSE FUND, AND THE COLORADO ASSOCIATION OF CHIEF'S OF POLICE IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The Denver Police Protective Association ("DPPA") is an association representing police officers who are employed

[1] The Denver Police Protective Association, Peace Officers Research Association of California Legal Defense Fund, and Colorado Association of Chief's of Police files this brief with the consent of all parties. The letters granting consent have been previously filed or are being filed concurrently. No counsel for a party authored this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

by the City and County of Denver, Colorado. The purpose of the DPPA is to improve conditions of employment of Denver officers, to aid in the improvement of the laws that govern the conduct and discipline of police officers, to encourage police professionalism, and to protect member-officers from injustice.

The Peace Officers Research Association of California Legal Defense Fund is an organization which provides prepaid group legal services to peace officers in matters related to their employment. The Fund and its member public safety organizations serve peace officers throughout the western United States. The following member public safety organizations of the fund also join in this brief: the Peace Officers Research Association of California, Peace Officers Research Association of Nevada, North Dakota Troopers Association, Arizona Police Association, National Border Patrol Council, Operating Engineers No. 3, Colorado Police Protective Association, Montana Police Protective Association, Oregon State Police Officers Association, Oregon Council of Police Associations, and Wyoming Highway Patrol Association.

The Colorado Association of Chiefs of Police (CACP) is a nonprofit organization comprised of chiefs of police of Colorado municipalities. CACP, has, as one of its purposes, representing the chiefs of police in matters of statewide concern to municipal law enforcement agencies, including representing its members before the state and federal appellate courts in Colorado.

The judgment of the Tenth Circuit Court of Appeals, if affirmed, will create great confusion for public employees in the performance of their duties, and leave them little guidance to evaluate when a property right exists and what process is due in the enforcement of that right. *Amici* believe that this case will impact the 156,607 law enforcement officers employed by the United States Government, the

105,933 employed by state governments, and approximately 800,000 law enforcement officers employed by local governments.[2] If unchecked, the impact of the subject decision may extend to approximately 18,000,000 other public employees, including 1,000,000 public welfare employees and 5,000,000 elementary and secondary school teachers.[3]

In addition, due to the inevitable shortages of resources and the status of police and other public employees as "first responders" in the War on Terror, circumstances likely will arise in which public safety employees will have to reconcile the process required by the Tenth Circuit with the demands of other emergency situations. Simply stated, the Court of Appeals decision in *Gonzales v. Town of Castle Rock*, 366 F.3d 1093 (CA10 2004), offers officers little guidance on how to exercise their discretion in such cases and subjects officers to liability if they fail to offer "street-level" due process.

Lastly, if the Court permits this constitutional claim to proceed, public employees will be left to apply the Court's analysis to innumerable other laws and regulations that govern their duties which may be read to confer a property right under the holding in *Gonzales*. The *Amici* are concerned that local and state governments will simply eliminate any law which may be read to confer a property right. The collateral effect will be the elimination of standards for public employees in the discharge of their duties. Such result would seriously undermine the delivery of all public services and lead to a system that is arbitrary and hostile to the very rights of citizens the *en banc* panel

---

[2] Source: U.S. Census, March, 2003 Public Employment Data.

[3] *Id.* For a discussion of the impact on school teachers for "educational malpractice," *See* 1987 WL 880162 (Brief of *Amicus Curiae* The National School Boards Association in Support of Respondents submitted in *DeShaney*).

sought to protect.

SUMMARY OF ARGUMENT

In 1964, Charles Reich wrote: "We must create a new property." Charles A. Reich, The New Property, 73 YALE L.J. 733, 787 (1964). Reich's call to the Courts focused on the rising need to protect "privileges," created by a state statute, which were replacing traditional forms of property. He wrote:

> Society today is built around entitlements. . . . Many of the most important of these entitlements now flow from government. . . . Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity.

Charles A. Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 YALE L.J. 1245, 1255 (1965).

Five years after its publication, Reich's article was cited with approval by a majority of this Court. *Goldberg v. Kelly*, 397 U.S. 254 (1970). In so doing, this Court held that a determination of whether a right was sufficient to give rise to constitutionally adequate procedures did not depend on the distinction of whether such benefit was a right or a privilege. *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970). Rather, the Court held that John Kelly had a property interest in continued welfare payments, the denial of which required pre-deprivation process consistent with the Fourteenth Amendment. Two years thereafter, in the companion cases of *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972), this Court held that a right to continued employment is, under certain circumstances, a property right which cannot be denied absent constitutionally sufficient procedures. The Court made clear in *Roth* that the question of whether an interest is

a property right does not depend on the "wooden" distinction between privileges and rights. *Roth*, 408 U.S., at 571.

This Court continued to recognize these "new" property rights over the course of the 1970s. As noted by the *en banc* panel of the Tenth Circuit, this Court has recognized that a person may have a property interest in professional licenses, driver's licenses, receipt of utility services, and disability benefits, *Gonzales v. City of Castle Rock*, 366 F.3d 1093 (CA10 2004) (*en banc*) (citation omitted), all of which are "new property" rights as characterized by Reich. 73 YALE L.J., at 786. These interests, once thought merely privileges, have been recognized as property rights that cannot be denied absent constitutionally adequate procedures.

Today, the Court is asked to decide whether the Tenth Circuit *en banc* majority was correct in expanding this "new property" to the "reasonable" police enforcement of a domestic restraining order. As in *DeShaney*, "[t]he facts of this case are undeniably tragic." *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 191 (1989). Nonetheless, this tribunal must determine whether the Defendants' conduct transgressed the standards of the Fourteenth Amendment of the United States Constitution, not whether their conduct was merely objectionable in the abstract. Once the emotion generated by the facts is set aside, the inescapable conclusion is that the Plaintiff in this case has no constitutional right to any pre-deprivation procedure. The underpinnings of this conclusion are: (1) the decision of the Court of Appeals is inconsistent with this Court's holding in *DeShaney*, 489 U.S., at 195, that the Due Process Clause is "phrased as a limitation on the State's power to act, not as a guarantee of certain minimum levels of security;" (2) the statute and restraining order at issue cannot create a reasonable expectation of a property right because too much is left to official discretion; (3) state officials are not liable on a claim under *Monell v. New York City Dept. of*

Social Servs., 436 U.S. 658 (1978), for mere negligent acts; and (4) the legislative history does not suggest that the General Assembly intended to create a property right .

Finally, the *en banc* decision of the Tenth Circuit, if affirmed, will hamper the effective and efficient delivery of all public benefits and services. Public employees exercise broad discretion in the daily discharge of their duties, at least as that term has previously been defined by *this* Court. If allowed to stand, the Tenth Circuit's analysis would dictate that certain tasks performed by public employees are not discretionary, but rather are mandatory, thus requiring a "street-level" pre-deprivation hearing. Such a requirement would bring government operations to a halt at the most basic level. The confusion created by this decision, if affirmed, will wreak its greatest havoc on the streets, where emergencies constantly force reallocation of scarce public safety resources.

ARGUMENT

I. Plaintiffs Had No Property Interest Under the Statute and Protective order, and Thus Plaintiffs Failed to State a Claim Under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

A. The Holding of the Court of Appeals Is Inconsistent With *DeShaney* and Creates an Incentive for State and Local Governments to Eliminate Similar Mandatory Statutes, Which Result Would Hamper the Delivery of Public Services

In *DeShaney*, a majority of this Court held that "nothing in the language of the Due Process clause itself requires the state to protect life, liberty, and property of its citizens against invasion by private actors." 489 U.S., at 195. Importantly, the Court noted that the Due Process

Clause is "phrased as a *limitation* on the State's power to act, not as a guarantee of certain minimum levels of security." *Id* (emphasis added). Thus, as the District Court concluded in this case, Plaintiffs could not proceed with either a substantive or procedural due process claim. The Tenth Circuit held that while there was no substantive claim, a claim nonetheless existed for the failure to provide a proper procedure for the enforcement of police protection created by the statute and order. *Amici* believe it would be inconsistent to hold on one hand that a State has no constitutional duty to provide police protection, while holding on the other hand that police protection cannot be denied without sufficient process. *DeShaney* was intended to foreclose a claim such as this where there was no affirmative abuse of power.

The analytical conclusion in this case, if affirmed, would allow state governments to recreate the rights-privileges distinction eliminated by this Court in *Goldberg*, and impose a font of federal tort liability. Governments would have no incentive to keep such privileges in existence. To do so would only invite litigation and liability. On this issue, Professor Erwin Chemerinsky wrote: "In essence, the rights-privileges distinction is recreated under a different label; the state could deny a property interest by making it clear that the benefit or program was something that the government could terminate at any point." Erwin Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (1997), at 432. The result of eliminating the specific statutory and regulatory guidance, Chemerinsky says, is that "the more arbitrary the government is, the less there can be reasonable expectations to continued receipt of the benefit, the less likely there will be a requirement of due process." *Id*. The result is public employees will have fewer specifically defined duties and will make decisions in a more arbitrary and inconsistent fashion. The result would be an even more chaotic and uneven public sector.

This Court must avoid this inevitable result, and hold

that an expectation in police enforcement is not a right of property protected by the Due Process Clause of the United States Constitution.

B. Police Officers Have Discretion Under C.R.S. § 18-6-803.5 and the Court Order to Decide Whether to Arrest and When to Seek a Warrant, Thus Negating Any Reasonable Expectation of Enforcement of the Order Sufficient to be Termed Property Under *Roth*

The Tenth Circuit's analysis has a narrow perspective of an official's exercise of executive discretion under the terms of C.R.S. 18-6-803.5, and would require District Courts to hold that many of the discretionary, executive functions engaged in by public employees actually create an expectation in members of the public that those duties are absolute. This Court has framed the issue of whether such expectation creates a property right in terms of whether the law creating the expectation of an entitlement places any "real limits on decisionmaker discretion." *Board of Pardons v. Allen*, 107 S.Ct. 2415, 2423 (1987) (O'Conner, J. dissenting); *See* also *Olim v. Wakenekona*, 461 U.S. 238 (1983); *Hewitt v. Helms*, 459 U.S. 460 (1988). In *Olim*, this Court wrote that:

> In order for an entitlement to exist, the underlying state law or order must contain particularized standards or criteria [guiding] the State's decision makers. If the decisionmaker is not required to base its decisions on objective and defined criteria, but instead can deny the requested relief for any constitutionally permissible reason or for no reason at all, the State has not created a constitutionally protected interest.

Olim, 461 U.S., at 249 (citation and internal quotations omitted).

The Tenth Circuit held that, under *Allen*, the term discretion can be read in "two distinct ways." *City of Castle Rock v. Gonzales*, 366 F.3d 1093, 1105 (CA10 2004). The first reading pertains to whether the official is "simply not bound by standards set by the authority in question." *Id.* (citation omitted). This inquiry, not addressed by the Court of Appeals, may lead to the conclusion that the Colorado General Assembly did not have the power to enact a statute that limited the executive discretion of local law enforcement officials in deciding whether to arrest at all. *See* Colorado Const., Art. XX.

The second reading of the term discretion may "instead signify that an official must use judgment in applying the standards set [sic] him [or her] by authority." *Id* (citation omitted). The Tenth Circuit in this case held that a determination of probable cause does not involve discretion. In passing, the Court says, "the officer is required to arrest or to seek a warrant to arrest the offending party." *Id.* While making a determination of probable cause could be said to be governed by objective predicates, the duty created by the statute at issue in this case contains *several* other discretionary decisions that must be made by local police officers, none of which contain "particularized standards or criteria". *Olim*, 461 U.S., at 249. The determination of probable cause is not, in short, the *only* decision an officer has discretion to make under the statute and court order. The remaining discretion available to officers with no particularized predicates voids any notion that the statute and order confer a property interest.

First, the order and statute at issue leave to the officer's discretion the determination of whether the suspect "knowingly" violated the order, *Gonzales*, 366 F.3d, at 1103. Certainly, making such a finding is discretionary, and no objective standards for rendering this decision are found.

Secondly, the restraining order is not clear as to what

an official is required to do when the suspect is not in a location known to the police at the time the allegations against the suspect are made. Obviously, if officers do not know the location of the suspect, they cannot arrest him. The officers in the instant case had no information on the whereabouts of the suspect until 8:30 pm. At that time they discovered that the suspect was not in their jurisdiction. 366 F.3d, at 1107 fn.11. Their decisions, at that point, were entirely discretionary under the language of the statute and order.

Even when the officers became aware of the suspect's location, their only defined duty was to "seek" a warrant for his arrest. *Id.*, at 1104 (citing C.R.S. § 18-6-803.5). The *en banc* panel noted that the officers were only under a duty to "use every reasonable means of enforcing the order." *Id.*, at 1103. Under the language of the statute, officers have ultimate discretion to determine what is "reasonable" in any given instance. This discretion is broadened when the suspect's whereabouts are unknown or the suspect is known to be in another jurisdiction.

The Panel seems to imply that the officers should have taken some action to pursue the suspect. Contrary to the Panel's suggestion, Colorado state statute mandates that peace officers "may not go outside the territorial boundaries of his authority to accomplish the *arrest* unless the officer is in fresh pursuit of the alleged offender." *People v. Vigil*, 729 P.2d 360, 365-66 (Colo. 1986) (emphasis added) (citing C.R.S. § 16-3-106). Thus, what the officers then decide to do turns on their perception of what is reasonable, leaving, under the Court of Appeals' analysis, District Courts to decide whether officers should have put out an "APB" to comply with the "reasonable" enforcement requirement. *Complaint* at 4. Admittedly, "reasonableness" under the Fourth Amendment is an objective standard. This standard, however, is based on a body of case law which does not apply here. In this instance, reasonableness must be

reviewed on considerations that include purely discretionary executive functions as how to best allocate scarce agency resources to maximize the delivery of law enforcement services to the public.

Further, the court order and statute at issue leave it up to officer discretion as to *when* such officer will "seek" an arrest warrant. C.R.S. § 18-6-803.5. Presumably, the officers in this case would have sought such an arrest warrant from a court had the suspect not violently ended his own life. The statute or order does not require the officer to *immediately* or *forthwith* obtain an arrest warrant if an arrest cannot be made. As such, a person can have no expectation as to *when* such an order will be sought, and thus can have no property interest of which she may be deprived.

In addition, the order and statute clearly contemplate that an officer will exercise his or her discretion as to whether to arrest since the statute permits officers to decide not to arrest if making an arrest would be "impracticable." C.R.S. § 18-6-803.5(3)(b). The term "impracticable" has been interpreted merely as "inconvenience." BLACK'S LAW DICTIONARY (6th Ed. 1990), at 756 (citing *Union Pac. R. Co. v. Woodahl*, 308 F.Supp. 1002, 1008 (Mont. 1970)). Another synonym for impracticable is "difficulty." *Woodahl*, 308 F.Supp., at 1007. An officer can thus refuse to arrest under the statute if he or she determines that it would be impracticable, inconvenient or difficult to arrest under the circumstances. There are no objective predicates set forth by the statute. The absence of such predicates defeats any expectation that the order or statute could confer a property right.

Ultimately, there is no way to assess what the officers were required to do in this instance. Officers were allegedly required to arrest. How could they arrest when the whereabouts of the suspect were unknown both to the officers and to Ms. Gonzales? The Officers were required to

use every reasonable means to bring the suspect to justice, but were barred by State law from pursuing the suspect outside of their jurisdiction. Officers can, under the terms of the order and statute, simply refuse to arrest if doing so would be impracticable, inconvenient, or difficult. If Officers cannot arrest, they must seek a warrant. The statute or court order, however, does not require them to do so immediately. In short, the statute leaves far too much discretion to police officials to be considered a property right under the test as set forth in *Olim* and *Roth*.

C. The Claim Must be Dismissed Because the Alleged Violation of the Fourteenth Amendment By Officers Was No More than a Negligent Omission

This Court has held that the "mere lack of due care by a state official" is insufficient to deprive an individual of life, liberty, or property under the Fourteenth Amendment *Daniels v. Williams*, 474 U.S. 327, 330 (1986). This Court wrote that, "Not only does the word deprive in the due process clause connote more than a negligent act, but we should not open the federal courts to lawsuits where there has been no affirmative abuse of power." *Id.*, at 330 (citation omitted). "Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Id.*, at 332 (citation omitted). In fact, "To hold that injury caused by such [negligent] conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law." *Id.*, at 332. In *Davidson*, this Court held that when an official "mistakenly believed that the situation was not particularly serious" or where the official "simply forgot" to do something, such "lack of care simply does not approach the sort of abusive government conduct the Due Process Clause was designed to prevent." *Davidson v. Cannon*, 474 U.S. 344, 348 (1986) (citation omitted). As

in *Daniels* and *Davidson*, *Amici* respectfully suggest that the conduct alleged in this case is "quite remote" from the concerns the Due Process Clause was enacted to protect. 474 U.S., at 332.

Although the claims against the officers were dismissed on grounds of qualified immunity, they could have been dismissed for failure to state a claim upon which relief may be granted. In this case there is nothing more than conclusory allegations which would permit an inference that the officers were anything more than merely negligent.

The complaint alleges that three officers dealt with Ms. Gonzales. *Compl.*, at 3-4. As to Officer Ruisi, it is alleged only that he did not "immediately" return the children to Ms. Gonzales. *Compl.*, at 3. Recall, however, that Officers Brink and Ruisi and Ms. Gonzales were not aware of their whereabouts. There are no facts alleged that Officer Ruisi could have "intended" the loss, i.e. the loss related to the failure to enforce. Thus, no claim is stated as to this officer.

As to Officer Brink, the complaint alleged that he did the same thing as Ruisi on the initial call. *Compl.*, at 3. Thereafter, Officer Brink was alleged to have received a telephone from Ms. Gonzales in which Ms. Gonzales notified Brink of the location of the suspect and requested that he "have someone check for Simon Gonzales or his vehicle at Elitch Gardens and put out an APB for Simon Gonzales." *Compl.*, at 3. No facts are alleged that Brink was anything more than negligent in his ultimate decision to not put out the APB and/or attempt to have a police department in another jurisdiction go searching for the car. It is important to recall that the terms of the restraining order do not require him to do anything more than that which is "reasonable," i.e., what another similarly situated officer would have done. As in *Davidson*, 474 U.S., at 348, at most, Officer Brink misperceived the severity of the situation.

As to Officer Ahlfinger, it is alleged that he heard Ms. Gonzales's complaint in person at the police station at 12:50 am, presumably after the amusement park had been closed. After hearing the story that Mr. Gonzales was not at *his* home with the children, that their whereabouts at that time were unknown, and that the suspect and children were still missing, it is alleged that Officer Ahlfinger "made no *reasonable* effort to enforce the TRO or locate the three children". Such conduct, it is respectfully submitted, is at best merely negligence and not actionable under the due process clause. *Compl.*, at 4 (emphasis added).

D. The Legislative History of the Act Supports the Conclusion that the General Assembly Did Not Intend to Create a Property Right in Restraining Order Enforcement

Amici respectfully suggest that it is inconsistent to find that the General Assembly intended to create a right of property while leaving in tact the immunity from suit afforded to public entities and officials in the performance of their duties brought under state law. *See* C.R.S. § 24-10-101, *et seq*. This inconsistency is starkly illuminated by the fact that the General Assembly refrained from providing any procedures due a person who demanded police action.

In footnote twelve of the *en banc* decision, the Court of Appeals took note of the fact that the State of Colorado and its political subdivisions were still immune from any suit related to a failure to enforce the law. The Court of Appeals incorrectly stated that the "GIA tells us *nothing* about whether Colorado intended by the statute before us to support the constitutionally protected entitlement of enforcement..." *Gonzales*, 33 F.3d, at 1108 (emphasis added). To the contrary, the General Assembly provided no remedy for the vindication of this right. C.R.S. § 24-10-106 (barring any claims that could lie in tort). This would suggest that the General Assembly did not intend to create a

property right to police enforcement. To do so would be to create a right without a remedy. In fact, the Court of Appeals even recognized that other states had waived immunity in situations such as this, permitting a victim of "unreasonable" police enforcement of a restraining order to sue individual police officers, *Gonzales*, 366 F.3d, at 1104 fn.9 (noting torts created by state statutes in three states under similar circumstances of this case). Yet, when it came to construing the fact that Colorado did *not* waive immunity vis-à-vis the breach of the legislatively imposed duty, the Court of Appeals was dismissive.

II. Assuming, *arguendo*, Plaintiffs Established That a Property Right Was Denied by Town of Castle Rock Officers, Plaintiffs Received All of the Process They Were Due Under the Constitution

Any process which may be due must strike a balance between the interests of the state and the individual. Under *Matthews v. Eldridge*, 424 U.S. 319, 348 (1976), "The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness." "All that is necessary is that the procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard." *Id*, at 349 (citation and internal quotations omitted). In this case, the procedures employed were sufficient such that the constitution did not require more procedure than that which was supplied, i.e., the opportunity to be heard in person and by phone, the opportunity to relate the facts as you know them, and the opportunity to make specific demands for action.

In this regard, there is one fallacy that permeates the Court of Appeals' reasoning as to issue of the process due. It derives from a liberal reading of the language of *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972), where this Court stated: "For when a person has an opportunity to speak up in his own

defense, and when the state must *listen* to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented." *Id.* (emphasis added).

In the instant action, the officers, as alleged in the complaint, took a restraining order call from Ms. Gonzales and went to her home. This seems a procedure suited for the circumstance. The Town offered Ms. Gonzales the opportunity to present her evidence in person to Town officials.

The Tenth Circuit incorrectly draws the inference of poor procedures from an alleged lack of consideration by the officers. Specifically, the Court found that the officers' lack of consideration was a "sham which rendered her property interest not only a nullity, but a cruel deception." 366 F.3d, at 1117. The Court also accuses the officers of not considering Ms. Gonzales's request in a timely fashion. *Id.* Nonetheless, on the facts plead, it is clear that Ms. Gonzales was heard: she expressed her complaint to officers in person at her home. She presented all of the evidence she had at that time, to which the officers listened. The suspect was not at the home, no one knew where he and the children were, and so the Officers went back to their duty. Then, as Ms. Gonzales learned more information, she shared that information with the police, who again heard it. This new information revealed that the suspect was in another jurisdiction. The process provided was ongoing.

For these reasons, the *Amici* request that this Court reverse the decision of the *en banc* panel and hold that the Plaintiff failed to state a claim requiring dismissal pursuant to Rule 12.

Respectfully submitted,

David J. Bruno
Counsel of Record
Jeffrey J. Clayton
Michael T. Lowe

Bruno, Bruno, & Colin, P.C.
1560 Broadway, Suite 1099
Denver, CO 80220
(303) 831-1099

Counsel for Amicus Curiae The Denver Police Protective Association and Amicus Curiae The Peace Officers Research Association of California Legal Defense Fund

Julie C. Tolleson, Esq.
Kennedy Christopher Childs & Fogg, PC
1050 17th Street, Suite 2500
Denver, Colorado 80265
Telephone: (303) 825-2700

Counsel for Amicus Curiae The Colorado Association of Chief's of Police

DATED: December 23, 2004

Supreme Court, U.S.
FILED
FEB 10 2005
OFFICE OF THE CLERK

No. 04-278

In The
Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children, REBECCA GONZALES, KATHERYN GONZALES, and LESLIE GONZALES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF AMICUS CURIAE THE FAMILY VIOLENCE PREVENTION FUND, THE NATIONAL CENTER ON DOMESTIC AND SEXUAL VIOLENCE [AND OTHERS] IN SUPPORT OF RESPONDENT

DEANNE M. OTTAVIANO
JANINE A. CARLAN
Counsel of Record
ARENT FOX PLLC
1050 Connecticut Ave., NW
Washington, DC 20036
(202) 857-6000

Of Counsel:
ALAN G. FISHEL
ANNE M. HAMILTON
ANNE L. MILEM
JENNIFER MYRON
POORVI BHUTWALA
ANITA KHUSHALANI
MARCY L. KARIN
ARENT FOX PLLC
1050 Connecticut Ave., NW
Washington, DC 20036
(202) 857-6000

Attorneys for Amici Curiae

LIST OF AMICI CURIAE

The Family Violence Prevention Fund, The National Center for Domestic and Sexual Violence, Oregon Law Center, Men Stopping Violence, Life-Span, Sanctuary for Families, Sanctuary for Families' Center for Battered Women's Legal Services and Sanctuary for Families' Children's Program, WEAVE, Ayuda, The Domestic Violence Project, Inc./SafeHouse Center, The Illinois Clemency Project for Battered Women, the Pace Women's Justice Center, and the Rockland Family Shelter.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 3

SUMMARY OF THE ARGUMENT 5

ARGUMENT 7

I. The Police Officers' Failure to Grant the Gonzales Children Even Minimal Due Process Undermined the June 4th Order and the Long History of Judicial and Legislative Efforts to Protect Victims of Domestic Violence the Hobbs Act 7

A. The Police Department's Refusal to Enforce the Protection Order Deprived the Gonzales Children of the Protection Promised Through Colorado State and Federal Laws 7

1. Protection Order Statutes in Colorado and Most States, Recognize Children As Protected Parties 10

Table Of Contents Con't

B. Child Custody and Visitation Provisions Contained in Protection Orders Reflect the Recognition that Abusive Parents Pose a Danger, and Are Designed to Limit Custodial Access To Ensure That Abused Women and Children Remain Safe.....16

II. The Police Violated the Gonzales Children's Procedural Due Process Rights.....18

A. The Children Had a Constitutionally Protectible Interest in Enforcement of The June 4th Order.....19

B. The Castle Rock Police Did Not Afford the Gonzales Children Any Due Process, Let Alone the Due Process to Which They Were Constitutionally Entitled.....26

CONCLUSION 28

TABLE OF AUTHORITIES

FEDERAL CASES

Cases Cited **Page**

Bellotti v. Baird, 443 U.S. 622 (1979) 19

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 20

Coffman v. Wilson Police Department, 739 F.Supp. 257 (E.D. Pa. 1990) 27

In re Gault, 387 U.S. 1 (1967) 19

Goldberg v. Kelly, 397 U.S. 254 (1970) 26

Gonzales v. City of Castle Rock, 366 F.3d 1093 (10th Cir. 2004)..... 3-4, 20, 24

Kentucky Department of Corrections v. Thompson, 490 U.S. 454 (1989).....21, 23

Morrissey v. Brewer, 408 U.S. 471 (1972).....23, 24

Olim v. Wakinekona, 461 U.S. 238 (1983) 20-21

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976).....19

Santosky v. Kramer, 455 U.S. 745 (1982) 26

Wisconsin v. Yoder, 406 U.S. 205 (1972) 19

Table Of Authorities Con't

STATE CASES

Cases Cited	Page
Aiken v. Stanley, 816 N.E.2d 427 (Ind. Ct. App. 2004)	11
Batey v. Dare, 742 So.2d 194 (Ala. Civ. App. 1999)	11
Commonwealth v. Majeed, 694 A.2d 336 (Pa. 1974)	11
Stuckey v. Stuckey, 768 P.2d 694 (Colo. 1989)	10
Trolinger v. Trolinger, 42 P.3d 157 (Kan. Ct. App. 2001)	11

FEDERAL STATUTES

Statutes Cited	Page
18 U.S.C. §§ 2265	12
18 U.S.C. §§ 2266	12, 13
H.R. Con. Res. 172, 101st Cong., 2d Sess., 104 Stat. 5183	17
Pub. L. No. 103-322, 108 Stat. 1902	12
U.S. Const. amend. XIV, § 1	18

Table Of Authorities Con't

STATE STATUTES

Statutes Cited	Page
Alaska Stat. § 25.24.150	17
Cal. Fam. Code § 6323	16
Colo. Rev. Stat. § 13-14-101	5
Colo. Rev. Stat. § 13-14-102	8, 17
Colo. Rev. Stat. § 13-14-108	22
Colo. Rev. Stat. § 14-4-101	5
Colo. Rev. Stat. § 14-4-102	16
Colo. Rev. Stat. § 14-10-109	25
Colo. Rev. Stat. § 14-10-124	18
Colo. Rev. Stat. § 18-6-803.5	*passim*
Del. Code Title 10 § 1041	10
Fla. Stat. 741.30(6)	16
Ill. Comp. Stat. Chap. 725	10, 16
Maine Rev. Stat. Title 19 § 764	10

Table Of Authorities Con't

MISCELLANEOUS

Cite **Page**

Nicole E. Allen, *et. al*, *Battered Women's Multitude of Needs: Evidence Supporting the Need for Comprehensive Advocacy*, 10 (9) Violence Against Women 1015 (Sage Pubs. Sept. 2004) 9

Lundy Bancroft, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics,* Synergy: Newsletter of the Nat'l Council of Juvenile and Family Court Judges (Winter 2002).....11

H. Lien Bragg, *Child Protection in Families Experiencing Domestic Violence*, Dep't of Human Services, Office of Child Abuse Neglect (2003).....13

Fred Brown, "New Domestic Violence Laws Take Effect; State Makes it Easier to Keep Abusers at Bay," DENVER POST, July 2, 1994.....13

Sarah M. Buel, *The Impact of Domestic Violence on Children: Recommendations to Improve Interventions* (2001).....15

Laura Crites & Donna Coker, *What Therapists See That Judges May Miss: A Unique Guide to Custody Decision When Spouse Abuse is Charged*, Judges J. (Spring 1988).....14

Table Of Authorities Con't

Cite **Page**

Jill Davies, *Building Opportunities for Battered Women's Safety and Self Sufficiency*, Violence Against Women Online Resources available at http://www.vaw.umn.edu/documents/welprac1/welprac1.html (1998).....9

FEMINIST PERSPECTIVES ON WIFE ABUSE (K. Yllo & M. Bogard, eds., Newbury Park, CA: Sage 1988).....11

Report of David Finkelhor, *et. al*, *Missing, Abducted, Runaway, and Thrownaway Children in America, Executive Summary* at v (U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention May 1990).....16

Melody K. Fuller & Janet L. Stansberry, *1994 Legislature Strengthens Domestic Violence Protective Orders,* 23 COLO. LAW. 2327 (1994) 10

GEOFFREY L. GREIF & REBECCA L.HEGAR, WHEN PARENTS KIDNAP: THE FAMILIES BEHIND THE HEADLINES, 221 (The Free Press 1993).....15

Barbara Hart, *Children of Domestic Violence: Risks and Remedies*, available at http:// www.mincava.unm.edu/hart/risks&r.htm.....15

Table Of Authorities Con't

Cite **Page**

Report of Barbara J. Hart, *Custody and Visitation Decision-Making When There Are Allegations of Domestic Violence* (1995) available at http://www.mincava.umn.edu/documents/hart/hart.html. 17

Report of Barbara Hart, *Parental Abduction and Domestic Violence* (1992) available at http://www.mincava.umn.edu/documents/hart/hart.html. 15

Peter Jaffe, *et. al*, *Child Custody and Domestic Violence: A Call for Safety and Accountability* (Sage Pubs. 2002) 14-15

Janet Johnston, *et. al*, , *Early Identification of Risk Factors for Parental Abduction*, Juvenile J. Bull. 10 (U.S. Department of Justice March 2001) 14

Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statues & Case Law*, 21 HOFSTRA L. REV. 801 (1993) 9

LEHRMAN, FREDERICA, DOMESTIC VIOLENCE PRACTICE & PROCEDURE, § 4:1 (1997, August 2004 Supp.) 8, 16

Table Of Authorities Con't

Cite **Page**

Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH.L.REV. 1 (1991) 14

L.G. Mills, *et. al.*, *Child Protection And Domestic Violence: Training, Practice and Policy Issues*, 22 Children & Youth Servs. Rev. 315 (2000) 14

NATIONAL COUNCIL OF JUVENILE & FAMILY COURT JUDGES, MODEL CODE ON DOMESTIC & FAMILY VIOLENCE, § 403 (1994) 17

Presentation of Jay G. Silverman, Ph.D., Harvard Univ., *Intimate Partner Violence against Women and Implications for the Health and Well-Being of Children: The Batterer as Parent* at Harvard Univ. (July 29, 2003). 12

Report of Evan Stark, Ph. D., MSW, Rutgers Univ., *The Battered Mother in the Child Protective Services Caseload: Developing an Appropriate Response* (undated, prepared for *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002)) 11

Evan Stark & Anne Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 INT'L J. OF HEALTH SERVS. 102 (1988) 12

Table Of Authorities Con't

Cite **Page**

Daniel G. Saunders, Ph. D., Univ. of Mich.,
Child Custody and Visitation Decisions In Domestic Violence Cases: Legal Trends, Research, Findings and Recommendations,
Violence Against Women Online Resources at 5 (1988) available at http://www.vaw.umn.edu/documents/vawnet/custody/ custody.html.. 18

INTEREST OF AMICI CURIAE[1]

The Family Violence Prevention Fund ("FVPF") is a national nonprofit organization, founded in 1980 and incorporated in the state of California. FVPF has worked to end violence against women and children for the past 25 years, including through providing education for the judiciary. FVPF knows that abused women confront many obstacles privately before asking a court to issue a protection order. Those orders, however, provide no protection for them or their children if not enforced by police.

The National Center for Domestic and Sexual Violence ("NCDSV"), a nonprofit organization founded in 1998 and incorporated in the state of Texas, is a national organization that provides training and technical assistance on issues of domestic violence and sexual assault. Much of this training and technical assistance focuses on law enforcement officials as NCDSV knows that the safety of abused women and children is further jeopardized when these officials refuse to enforce protection orders.

---

[1] Letters from petitioner and respondent indicating consent to file this brief are on file with the Clerk. Pursuant to Rule 37.6, no counsel for any petitioner or respondent authored this brief in whole or in part. Nor did any person or entity other than *amici* make a monetary contribution to the preparation or submission of this brief.

The remaining amici are: the Oregon Law Center, a nonprofit law firm that was incorporated in the state of Oregon in July 1998; Men Stopping Violence, a nonprofit organization founded in 1982 and incorporated in the state of Georgia; Life-Span, a nonprofit organization established in 1978 and incorporated in the State of Illinois in 1979; Sanctuary for Families, a nonprofit organization founded in 1984 and incorporated in the State of New York, and its programs, Sanctuary for Families' Center for Battered Women's Legal Services and Sanctuary for Families' Children's Program; WEAVE, a nonprofit organization founded in 1996 and incorporated in the District of Columbia; Ayuda, a nonprofit organization founded in 1973 and incorporated in the District of Columbia; the Domestic Violence Project, Inc./SafeHouse Center, a nonprofit organization founded in 1975 and incorporated in the state of Michigan; the Illinois Clemency Project for Battered Women, an organization founded in 1993 in Illinois; the Pace Women's Justice Center, a nonprofit 501(c)(3) organization founded in 1991 and incorporated in the state of New York; and the Rockland Family Shelter, a nonprofit organization founded in 1977 and incorporated in the state of New York. These organizations provide legal services, counseling, safety planning, legislative advocacy and related services to victims of domestic violence and their children. They all believe that mandatory protection order

enforcement is required to ensure the safety of abused women and children.

STATEMENT OF THE CASE

On May 21, 1999, fearing for the safety of herself and her children, Rebecca, Katheryn and Leslie ("the Gonzales Children" or "the Children"), Ms. Gonzales obtained a temporary protection order ("TPO") against Mr. Gonzales, her husband, based on the Douglas County District Court's express finding that physical or emotional harm would result if Mr. Gonzales was not excluded from the family home. (P.A. 3a) The TPO granted temporary custody of the Children to Ms. Gonzales, prohibited Mr. Gonzales from molesting or disturbing the peace of the Children or Ms. Gonzales, and consequently barred him from coming within 100 yards of the family residence. (*Id.*)

On June 4, 1999, the TPO was served on Mr. Gonzales, and on that same date, the TPO was slightly modified by the Court and made permanent (the "June 4th Order"). The court issued this order after determining that it was in the Children's best interest to allow their mother sole custody, except that Mr. Gonzales could come to the home for the limited purpose of picking up the Gonzales Children for parenting time. (P.A. 4a-5a); *Gonzales v. City of Castle*

Rock, 366 F.3d 1093, 1097 (10th Cir. 2004).[2] The remaining prohibitions on Mr. Gonzales's contact with the family that were in the TPO were continued. In addition, the June 4th Order directed law enforcement officials that they "shall use every reasonable means to enforce" the restraining order, they "shall arrest" or where impractical, seek an arrest warrant for those who violate the restraining order, and they "shall take the restrained person to the nearest jail or detention facility." *Id.* at 1096.

On Tuesday, June 22, 1999, only two and a half weeks after the court issued the June 4th Order to protect the Gonzales Children, Mr. Gonzales abducted the Children while they were playing outside their home. During a long, and no doubt terrifying night for the Children, police for the Town of Castle Rock ("Castle Rock") ignored Ms. Gonzales's in-person request for enforcement of the June 4th Order against Mr. Gonzales, as well as her many calls over the course of the evening and into the early morning hours of the next day.

---

[2] At the time the June 4th Order was issued, Colorado defined domestic abuse as follows:

> any act or threatened act of violence that is committed by any person against another person with whom the actor is a current or former relation, or with whom the actor is living or has lived in the same domicile, or with whom the actor is involved or has been involved in an intimate relationship.

Continued . . .

Finally, at 3:20 a.m., Mr. Gonzales arrived at Castle Rock police headquarters and opened fire. The police found the Children, whom Mr. Gonzales had murdered, in his vehicle.

The police officers' failure to enforce the June 4th Order, in the face of its mandatory language and the Colorado mandatory arrest statute, Colo. Rev. Stat. § 18-6-803.5, was a violation of the Gonzales Children's constitutionally protected procedural due process rights. The Tenth Circuit held as much, and this appeal followed.

SUMMARY OF THE ARGUMENT

The Castle Rock police department's failure to grant the Gonzales Children even minimal procedural due process before refusing to enforce the June 4th Order their mother had obtained violated the Children's Fourteenth Amendment rights.

Like many other states, Colorado clearly recognizes that children can be protected parties under a protection

---

Continued . . .
Colo. Rev. Stat. Ann. § 14-4-101(2) (amended and recodified at Colo. Rev. Stat. § 13-14-101(2)).

order issued to prevent an abusive parent from causing future harm. Further, in a 1994 overhaul of the state's domestic violence laws, the Colorado General Assembly adopted a protection order provision with a mandatory arrest requirement for violators. Colo. Rev. Stat. § 18-6-803.5. Mandatory arrest provisions, which require police to arrest protection order violators on probable cause, promote the safety of women and children, especially in light of the considerable research and data that demonstrate the dangers to women and children of attempting to separate from their abuser.

The June 4th Order, coupled with the mandatory arrest provisions of the Colorado statute, created a constitutionally protectible interest held by the Children and their mother. Given this, minimal procedural due process, including at least a few minutes of discussion and evaluation, had to be provided before police could grant or deny enforcement of the June 4th Order. As the Tenth Circuit properly concluded, the Castle Rock police officers' refusal to even consider enforcement of the June 4th Order did not satisfy this constitutional standard.

Amici urge the Court to hold that such minimal procedural due process inquiries must occur when women and/or children seek protection order enforcement in a state

that has a mandatory arrest requirement in its protection order statute.

ARGUMENT

I. The Police Officers' Failure to Grant the Gonzales Children Even Minimal Due Process Undermined the June 4th Order and the Long History of Judicial and Legislative Efforts to Protect Victims of Domestic Violence

The Gonzales Children's deaths are undeniably tragic. Their short lives were ended violently by the very person from whom a court had determined they needed protection. Yet, rather than enforcing the June 4th Order, as mandated by the Colorado statute, the police eviscerated the court's work by refusing to act – in direct contravention of the judiciary's mandate and in abdication of their mandatory obligations under the Colorado statute.

A. The Police Department's Refusal to Enforce the Protection Order Deprived the Gonzales Children of the Protection Promised Through Colorado State and Federal Laws

In 1994, the Colorado General Assembly passed H.B. 1253, omnibus legislation overhauling Colorado's domestic violence law, Colo. Rev. Stat. § 18-6-803.5, to strengthen the

protections for victims of domestic violence. The legislation instituted a mandatory statewide arrest policy for the violators of domestic violence protection orders.[3] In the same section that provides for the mandatory arrest of protection order violators, the General Assembly gave police officers immunity from liability arising from erroneous arrests made in the course of enforcing protection orders. Colo. Rev. Stat. § 18-6-803.5(5). Thus, the General Assembly expressed its preference that police officers be prompt and assertive in their arrests of protection order violators, rather than slow and circumspect.

Civil protection order statutes provide victims of domestic violence as well as their children with the opportunity to prevent future violence by obtaining a court order instructing an abuser to refrain from or to undertake specific acts. *See* FREDERICA LEHRMAN, DOMESTIC VIOLENCE PRACTICE & PROCEDURE, § 4:1 at 4-2 (1997, August 2004 Supp.). In recognition of the protection they can provide, every state in the nation has enacted statutes that enable courts to issue protection orders where they find that domestic violence has been perpetrated. *See id.* The relief available through state protection order statutes is as

[3] The General Assembly concluded "the issuance and enforcement of protection orders are of paramount importance . . . because [they] promote safety, reduce violence, and prevent serious harm and death." Colo. Rev. Stat. Ann. § 13-14-102.

varied as are the safety needs of abused women and their children. *See* Nicole E. Allen, *et. al*, *Battered Women's Multitude of Needs: Evidence Supporting the Need for Comprehensive Advocacy*, 10 (9) Violence Against Women 1015 (Sage Pubs. Sept. 2004).[4]

Protection orders, however, are only as effective as their enforcement. An order without enforcement can create a false sense of security for victims of domestic violence, and actually increase the chance of danger to the very person or persons the order is intended to protect. *See* Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statues & Case Law*, 21 HOFSTRA L. REV. 801, 1095 (1993) ("For enforcement to work . . . most of all, police, prosecutors, and judges should respond sternly to violations that are reported."). A protection order is one of several strategies employed by abused women and children as part of a larger safety plan. *See* Jill Davies, *Building Opportunities for Battered Women's Safety and Self Sufficiency*, Violence Against Women Online Resources available at http://www.vaw.umn.edu/documents/welprac1/welprac1.html (1998). Were it not for the security of the protection order, as promised

[4] Where possible, counsel has identified the availability of some of the publications cited on the World Wide Web. All of these publications are available from counsel and can be promptly furnished to the Court upon request.

through the statute and the order itself, Ms. Gonzales may well have made different decisions for herself and her children with regard to safety planning around work, child care, travel, and perhaps even relocation.

1. Protection Order Statutes in Colorado, and Most States, Recognize Children As Protected Parties

Over the past thirty years, states have enacted legislation in recognition of the danger that perpetrators of domestic violence pose to their ex-partners as well as their children. In Colorado, as in most jurisdictions, protection orders are intended to protect both the abused partner and the children by providing them with a legally enforceable means of achieving safety.[5] *See* Melody K. Fuller & Janet L. Stansberry, *1994 Legislature Strengthens Domestic Violence Protective Orders*, 23 COLO. LAW 2327 (1994); *Stuckey v. Stuckey*, 768 P.2d 694 (Colo. 1989) (affirming a permanent

[5] In addition to gaining protection through an order issued on behalf of their parent, children can benefit from an order issued entirely on their own behalf. Many statutes authorize an adult to file for a civil protection order on behalf of a minor child who has suffered physical or sexual abuse at the hands of his or her parent. *See e.g.*, Del. Code Title 10 § 1041(1)(vi); Ill. Comp. Stat. Chap. 725 § 5/112A-4(b); Maine Rev. Stat. Title 19 § 764(1).

restraining order forbidding the father of a minor child from having any contact with the child).[6]

State legislators enacted these statutes in response to the overwhelming evidence that individuals who perpetrate domestic violence against their spouses or partners are several times more likely to abuse their children. *See* Lundy Bancroft, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics,* Synergy: Newsletter of the Nat'l Council of Juvenile and Family Court Judges (Winter 2002) at 6. In cases involving parental child abuse, researchers have found that a history of domestic violence by one parent against the other is "perhaps the single most common background factor." Report of Evan Stark, Ph. D., MSW, Rutgers Univ., *The Battered Mother in the Child Protective Services Caseload: Developing an Appropriate Response* (undated, prepared for *Nicholson v. Williams,* 203 F. Supp. 2d 153 (E.D.N.Y. 2002)). In fact, one study found that 70% of perpetrators of domestic violence physically abused their children. Bowker, L. H., Arbitell, M., & McFerron, J. R. (1988), cited in FEMINIST PERSPECTIVES ON WIFE ABUSE 158-174 (K. Yllo & M. Bogard eds., Newbury Park, CA: Sage 1988). Simply put,

[6] *See also Aiken v. Stanley,* 816 N.E.2d 427 (Ind. Ct. App. 2004); *Commonwealth v. Majeed,* 694 A.2d 336 (Pa. 1997); *Trolinger v. Trolinger,* 42 P.3d 157 (Kan. Ct. App. 2001); *Batey v. Dare,* 742 So. 2d 194 (Ala. Civ. App. 1999).

children with an abusive parent stand a greater risk of harm. *See* Evan Stark & Anne Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 INT'L J. OF HEALTH SERVS. 102 (1988); *see also* Presentation of Jay G. Silverman, Ph.D., Harvard Univ., *Intimate Partner Violence against Women and Implications for the Health and Well-Being of Children: The Batterer as Parent* at Harvard Univ. (July 29, 2003) (citing Herman-Giddens et al., 2000) (preceding publication of L. BANCROFT, J.G. SILVERMAN, "ASSESSING ABUSERS RISKS TO CHILDREN" IN PROTECTING CHILDREN FROM DOMESTIC VIOLENCE: STRATEGIES FOR COMMUNITY INTERVENTION (P. Jaffe, L. Baker, & A. Cunningham, eds., Guildford Publications, N.Y. 2004)).

The United States Congress recognized the dangers that abusers pose to abused women and their children when it passed the Violence Against Women Act ("VAWA") in 1994. Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.). In particular, Congress acknowledged the heightened risk to abused parents and their children post-separation when it included in the VAWA "Full Faith and Credit" provisions that mandate nationwide enforcement of protection orders. 18 U.S.C. §§ 2265-2266.

The VAWA Full Faith and Credit provisions require that all relief included in any state's protection order must be

enforced by any other state, so long as the protection order was "issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person[.]" 18 U.S.C. § 2266(5). The provisions apply to *ex parte,* temporary, and permanent orders that are issued by a civil or criminal court "whether obtained by filing an independent action or as a pendente lite order in another proceeding, so long as any civil order was issued in response to a complaint, petition or motion filed by or on behalf of a person seeking protection." *Id.*

Modern domestic violence laws also recognize that domestic violence can have life altering, detrimental impacts on children. *See* H. Lien Bragg, *Child Protection in Families Experiencing Domestic Violence*, Dep't of Human Services, Office of Child Abuse Neglect, at 15-17, 26-27 (2003); *see also* Fred Brown, "New Domestic Violence Laws Take Effect; State Makes it Easier to Keep Abusers at Bay," DENVER POST, July 2, 1994 ("Sponsors of the 1994 Colorado legislature cited 'significant links between incidents of domestic violence and juvenile violence' as one of the many reasons for enacting such sweeping changes.").

In many instances, domestic violence culminates in murder or murder-suicide. And, as in this case, the murder victims often include children. Indeed, "domestic violence

has been found to be the single most common precursor to child death in the United States." National Center for Children Exposed to Violence, available at www.nccev.org/ violence/ domestic.html (citing L. G. Mills, *et. al., Child Protection and Domestic Violence: Training, Practice and Policy Issues*, 22 (5) Children & Youth Servs. Rev., 315-332 (2000)).

Further, the risk of harm to abused women and their children from an abusive spouse increases during the period following separation. Men who engage in domestic violence often want to punish the woman for separating from them to penalize her for exercising her autonomy.[7] This terroristic goal is all too frequently accomplished through the physical assault, abduction, or even murder of the children whom she loves. Laura Crites & Donna Coker, *What Therapists See That Judges May Miss: A Unique Guide to Custody Decision When Spouse Abuse is Charged*, Judges J. (Spring 1988); *see also* Peter Jaffe, *et. al, Child Custody and Domestic*

---

[7] *See* Janet Johnston, *et. al*, , *Early Identification of Risk Factors for Parental Abduction*, Juvenile J. Bull. 10 (U.S. Department of Justice March 2001) ("[A]busive husbands are more likely to seriously harm or kill their wives during marital separation."); *see also* Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991) (termed "separation assault," the increased risk of assault arises from the blatant threat that an abused woman's separation poses to her former partner's authority and control).

Violence: A Call for Safety and Accountability (Sage Pubs. 2002).

Children of separating parents are often the link that provides the abusive parent with additional opportunities to exert control over his former partner. Sarah M. Buel, *The Impact of Domestic Violence on Children: Recommendations to Improve Interventions* (2001); *see also* Barbara Hart, *Children of Domestic Violence: Risks and Remedies*, available at http://www.mincava.unm.edu/hart/ risks&r.htm (Abusive parents "use custodial access to the children as a tool to terrorize battered women or to retaliate for separation."); Report of Barbara Hart, *Parental Abduction and Domestic Violence*, (1992) available at http://www. mincava.umn.edu/documents/hart/hart.html.

Children of abusive parents are at enormous risk for child abduction and concomitant violence. *See* Hart, *Children of Domestic Violence: Risks and Child Remedies*, (40.4 children are abducted by a parent each hour, 41% of which occurs between the time of their parents' separation and divorce); GEOFFREY L. GREIF & REBECCA L.HEGAR, WHEN PARENTS KIDNAP: THE FAMILIES BEHIND THE HEADLINES, 221, 225, (The Free Press 1993) (the children most at risk for parental kidnapping are the one-quarter of all American children who live with only one parent). In 1988, an estimated 354,100 children were abducted by family

members, either in violation of a custody agreement or decree or by failing to return the child at the end of an ordered or agreed-upon visit. Report of David Finkelhor, *et. al, Missing, Abducted, Runaway, and Thrownaway Children in America, Executive Summary,* at v (U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention May 1990). Men committed most of these abductions. *Id.* at xi. As in this case, the children taken are most often between the young ages of two to eleven years old and over half of the abductions involve unauthorized takings of the children, generally from the children's homes. *Id.*

B. Child Custody and Visitation Provisions Contained in Protection Orders Reflect the Recognition that Abusive Parents Pose a Danger, and Are Designed to Limit Custodial Access To Ensure That Abused Women and Children Remain Safe

Almost every state provides that a court can award temporary custody and visitation as one of the provisions in a civil protection order.[8] In some states, such as Colorado at the time of Ms. Gonzales's hearing, there is a presumption against awarding custody to abusive parents pursuant to a civil protection order. Colo. Rev. Stat. § 14-4-102(d)(III)

---

[8] *See* LEHRMAN, DOMESTIC VIOLENCE PRACTICE & PROCEDURE, § 4:23 at 4-26; *see, e.g.*, Cal. Fam. Code § 6323; Fla. Stat. 741.30(6)(a); Ill. Stat. Chapter 725.

(amended and recodified at Colo. Rev. Stat. § 13-14-102(15)(e)(II.5)). Some states require courts to give primary consideration to the safety of the petitioner and the children in making custody decisions pursuant to protection orders. *See, e.g.*, Alaska Stat. § 25.24.150.

Most states also require courts to consider the impact of domestic violence when weighing the best interests of the child in custody and visitation proceedings. *See* Report of Barbara J. Hart, *Custody and Visitation Decision-Making When There Are Allegations of Domestic Violence* (1995) available at http://www.mincava.umn.edu/documents/hart/hart.html (reporting that, in 1995, 44 states and the District of Columbia had custody statutes that required courts to consider domestic violence when deciding custody).

Congress has gone even further. Noting that children of abusers are "at risk through shared custody arrangements," both the House and the Senate unanimously recommended the creation of a statutory presumption against awarding custody to an abusive parent. H.R. Con. Res. 172, 101st Cong., 2d Sess., 104 Stat. 5183 (1990) (the "Concurrent Resolution"). Section 403 of The Model Code of the Family Violence Project of the National Council of Juvenile and Family Court Judges (the "Model Code"), adopted by numerous states, incorporates the recommendations of the Concurrent Resolution. *See*

NATIONAL COUNCIL OF JUVENILE & FAMILY COURT JUDGES, MODEL CODE ON DOMESTIC & FAMILY VIOLENCE, § 403, at 34 (1994). *See also* Daniel G. Saunders, Ph. D., Univ. of Mich., *Child Custody and Visitation Decisions In Domestic Violence Cases: Legal Trends, Research, Findings and Recommendations*, Violence Against Women Online Resources at 5 (1988) available at http://www.vaw.umn.edu/documents/vawnet/custody/ custody.html.

In 1994, in the wake of the Concurrent Resolution and the Model Code, the Colorado legislature expressly amended the state's child custody laws to direct the award of temporary custody to the non-violent parent and to create a presumption against awarding permanent custody to an abuser. Colo. Rev. Stat. Ann. § 14-10-124. For this very reason, in this case, the Court granted Ms. Gonzales sole custody and restricted visitation in order to minimize future abuse to herself and her children.

II. The Police Violated the Gonzales Children's Procedural Due Process Rights

The Fourteenth Amendment of the U.S. Constitution dictates that no State shall "deprive any person of life, liberty, or property, without due process of law...." U.S. Const. amend. XIV, § 1. The Castle Rock police violated this mandate and the constitutional rights of the Gonzales

Children when they repeatedly ignored the Children's mother's pleas for enforcement of the June 4th Order issued to protect them from their abusive father.

A. The Children Had a Constitutionally Protectible Interest in Enforcement of the June 4th Order

This Court held nearly 40 years ago that children are entitled to the protections of the Fourteenth Amendment. *See In re Gault*, 387 U.S. 1, 13 (1967). ("[W]hatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."). Since then, the Court has repeatedly affirmed that children are "person[s]" within the meaning of the Fourteenth Amendment, and that, like adults, they have "constitutionally protectible interests." *Wisconsin v. Yoder*, 406 U.S. 205, 243 (1972)(Douglas, J. dissenting). *See also Bellotti v. Baird*, 443 U.S. 622, 633 (1979)("A child, merely on account of minority, is not beyond the protection of the Constitution."); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.").

The Gonzales Children's due process claim, therefore, rises or falls on whether their interest in enforcement of the June 4th Order amounted to a constitutionally protectible property interest. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) (*citing Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). The Tenth Circuit held that it did, concluding that Colorado created a property interest within the meaning of the Fourteenth Amendment when it issued the June 4th Order. *Gonzales,* 366 F.3d at 1116.

Constitutionally protectible property interests "extend well beyond actual ownership of real estate, chattels, or money" to include "the security of interests that a person has already acquired in specific benefits." *Roth*, 408 U.S. at 572, 576. Such interests are created and defined "by existing rules or understandings that stem from an independent source such as state law." *Id.* at 577. They rise to the level of constitutionally protectible property interests where a "legitimate claim of entitlement" to the benefit in question exists, not merely a "unilateral expectation" or "abstract need or desire" for it. *Id.*

Whether a legitimate claim of entitlement exists turns on whether the underlying state statute establishing the benefit contains "particularized standards or criteria [to] guide the State's decisionmakers." *Olim v. Wakinekona*, 461

U.S. 238, 249 (1983). Where such substantive limits on official discretion exist and are coupled with a statutory mandate as to the "outcome [to] be reached upon a finding that the relevant criteria have been met," a constitutionally protected interest arises. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 492 (1989). "[T]he use of 'explicitly mandatory language,' in connection with the establishment of 'specified substantive predicates' to limit discretion, forces a conclusion that the State has created a [constitutionally protectible] interest." *Id.* at 463.

The June 4th Order issued on behalf of the Children combined "specified substantive predicates" with "explicitly mandatory" enforcement language and therefore gave rise to a Constitutionally protectible interest. The specified substantive predicate was the June 4th Order's prohibition against Mr. Gonzales molesting or disturbing the Children's peace or coming within 100 yards of their home except under limited circumstances. Enforcement of this prohibition was not left to the court's general power of contempt. Instead, the June 4th Order specified mandatory self-executing consequences for its violation: the arrest of Mr. Gonzales. It directed law enforcement officials to "use every reasonable means" to enforce the June 4th Order, and specifically instructed them to arrest Mr. Gonzales and take him to the nearest jail or detention facility if they had "information amounting to probable cause" that he had

violated or attempted to violate the terms of the June 4th Order:

> "YOU SHALL ARREST, OR, IF AN ARREST WOULD BE IMPRACTICAL UNDER THE CIRCUMSTANCES, SEEK A WARRANT FOR THE ARREST OF THE RESTRAINED PERSON WHEN YOU HAVE INFORMATION AMOUNTING TO PROBABLE CAUSE THAT THE RESTRAINED PERSON HAS VIOLATED OR ATTEMPTED TO VIOLATE ANY PROVISION OF THIS ORDER . . ." (P.A. 92a).[9]

Taken together, the June 4th Order and the Colorado protection order statute set forth objectively ascertainable requirements as to Mr. Gonzales's conduct-- not molesting or disturbing the Children or coming within 100 feet of their

---

[9] These requirements on the face of the June 4th Order mirrored the requirements of Colorado's protective order statute, Colo. Rev. Stat. § 14-10-108, upon which authority it was issued. Like the Order, the statute uses mandatory "YOU SHALL" language to refer to law enforcement's obligation to arrest. Colo. Rev. Stat. § 18-6-803.5(3)(b). The mandatory "YOU SHALL" arrest language is markedly stronger than the "YOU ARE AUTHORIZED" language used in subsequent sentences of the Order (and subsequent sections of the statute) to refer to the authority of the police to take efforts to protect the victim and the victim's children, such as by transporting them to a shelter. Colo. Rev. Stat. § 18-6-803.5(3)(b), (6)(a). Clearly, the legislature knew the difference between "mandatory" and "discretionary" mandates, and chose to make the arrest provisions mandatory.

family home. They also dictated the consequences for violation of these requirements-- directing the police to arrest Mr. Gonzales when they have information amounting to probable cause to believe that he has violated the requirements. The combination of limited police discretion and statutorily mandated consequences gave rise to a legitimate claim of entitlement by both Ms. Gonzales and her children. *See Thompson*, 490 U.S. at 492. That legitimate claim of entitlement was nothing more than that the terms of the June 4th Order would be enforced. The police department's arbitrary refusal to do so constituted a violation of the Children's rights to procedural due process. It allowed the very horror that the June 4th Order and the statute were designed to prevent-- the foreseeable infliction of abuse upon the children by their father.

Relying on *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), the Town of Castle Rock argues that the "nature" of the Children's interest in enforcement of the June 4th Order was not such as to merit constitutional protection, Pet. Brief at 17, despite the fact that these children are named in the June 4th Order. In Castle Rock's view, the Children's interest stands in "stark contrast" to the interest of a parolee in continued conditional liberty. Although there is a contrast between the two interests, we conclude that it is the parolee's interest that pales by comparison with that of the Children. Parolees are, by definition, convicted felons who have

forfeited their right to unconditional liberty. Revocation of parole deprives them "not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." *Morrissey,* 408 U.S. at 480. Children are, on the other hand, innocents at the mercy of the government to enforce their rights. Those children on whose behalf a protection order has been issued are particularly vulnerable because a court has already concluded that if protection is not provided in accordance with the terms of that order, an abusive parent is likely to inflict serious, or as in this case, lethal, harm. It is hard to imagine an interest more deserving of constitutional protection.

The Town of Castle Rock also argues that the Court should not allow "hindsight" to influence its determination of whether the Children's interest in enforcement of the June 4th Order amounts to a constitutionally protectible interest, "as it is only the rare instance in which police judgments regarding the balancing of [competing] demands [] leads to a tragic outcome." Pet. Brief at 18. This position ignores the very premise upon which the June 4th Order was based: an explicit finding by the issuing court that physical or emotional harm would likely result to the Children if the police did not keep Mr. Gonzales away from them and their home. *Gonzales*, 366 F.3d at 1096; (P.A. 3a). In arriving at this finding, the issuing court did not rely upon hindsight.

To the contrary, it took testimony and weighed relevant evidence, including Mr. Gonzales's notable history of erratic behavior and suicide attempts, both commonly understood to be indicia of future acts of domestic violence. *See* Section I.A.1. *supra*.

Indeed, a principal purpose of Colorado's 1994 domestic violence law was to take police discretion and hindsight out of the equation by providing for mandatory arrest where information amounting to probable cause to arrest exists. *See* Colo. Rev. Stat. § 14-10-109; Colo. Rev. Stat. § 18-6-803.5.[10] The combination of "prior restraint" and mandatory arrest is designed to ensure that children receive the protection they need and deserve at a meaningful time-- before an abusive parent harms them.

By consciously and affirmatively refusing to enforce the June 4th Order, the Castle Rock Police took it upon themselves to eliminate the critical mandatory arrest feature

---

[10] Castle Rock makes much of the fact that the June 4th Order gave the police the option of "merely" seeking an arrest warrant where immediate arrest was impractical, or of using other "reasonable means" to enforce the June 4th Order. Yet, like immediate arrest, these options all furthered the critical objective of enforcing the June 4th Order and thereby preventing domestic violence. The option the police took here-- ignoring Ms. Gonzales's pleas for enforcement-- was one not authorized by the June 4th Order or the statute. It served no purpose other than to indulge the individual police officers' laziness and to facilitate Mr. Gonzales's lethal plans.

of this carefully designed statutory scheme, contravening both the will of the legislature and the express terms of the June 4th Order. Having done so, it is ironic that they now decry the Tenth Circuit for allegedly "supplanting the State's enforcement procedures" by recognizing that the Children had a constitutionally protectible interest in having the June 4th Order enforced. (Pet. Brief at 24).

B. The Castle Rock Police Did Not Afford the Gonzales Children Any Due Process, Let Alone the Due Process to Which They Were Constitutionally Entitled

The termination of a protected property interest always calls for some "orderly process." *Morrissey*, 408 U.S. at 482. The precise contours of that process vary, depending upon the circumstances involved, and in particular "the extent to which the recipient may be 'condemned to suffer grievous loss.'" *Santosky v. Kramer*, 455 U.S. 745, 758 (1982). Regardless of the interest at stake, however, the right to be heard must be conducted "at a meaningful time and in a meaningful manner." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

The interest at stake in enforcement of the June 4th Order here was the well-being-- and indeed the lives-- of innocent children. It is difficult to imagine a more compelling interest than theirs-- or one more deserving of

process. Yet, the Castle Rock police gave the Children no process at all. Despite numerous pleas for help from their mother and a June 4th Order that expressly named them as beneficiaries, the police did absolutely nothing after their father abducted them. They did not even make a probable cause determination, let alone act on it as mandated by the statute. Three defenseless children were murdered as a result.

The process that would have prevented this tragedy is the process to which the Children were constitutionally entitled: it was neither a formal hearing nor a cumbersome investigation, but rather a reasoned police response, including a brief inquiry as to the validity of the June 4th Order and the existence of probable cause. *Coffman v. Wilson Police Dep't*, 739 F. Supp. 257, 266 (E.D. Pa 1990).

Most importantly, this process should have been provided *before* the police decided not to enforce the June 4th Order because, predictably, the Children did not live long after that arbitrary decision. Where innocent children are at risk of being harmed or killed by an abusive parent, there can be no question that process delayed is process denied.

CONCLUSION

Given the alleged custom and policy of the Castle Rock police in disregarding claims of protection order violations, it is very likely that many more children will be exposed to increased risk of harm, or even death, if protection orders continue to be ignored. Without effective enforcement, protection orders are meaningless. *Amici* urge this Court to clarify that procedural due process rights must be safeguarded when police are presented with evidence that a protective order has been violated in a state with a mandatory arrest statute. While it is too late to save Rebecca, Katheryn and Leslie, the lives of other young children almost certainly depend on it.

Respectfully submitted,

Deanne M. Ottaviano
Janine A. Carlan
Counsel of Record
ARENT FOX PLLC
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 857-6000

Of Counsel:

Alan G. Fishel
Anne M. Hamilton
Anne L. Milem
Jennifer Myron
Poorvi Bhutwala
Anita Khushalani
Marcy L. Karin
ARENT FOX PLLC
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 857-6000

Attorneys for *Amici Curiae*

February 9, 2005

No. 04-278

FEB 9 - 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

—v.—

JESSICA GONZALES, individually and as next best friend of her deceased minor children, REBECCA GONZALES, KATHERYN GONZALES, and LESLIE GONZALES,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF INTERNATIONAL LAW SCHOLARS AND WOMEN'S, CIVIL RIGHTS AND HUMAN RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

JENNIFER K. BROWN*
MAYA RAGHU
LEGAL MOMENTUM
395 Hudson Street
New York, New York 10014
(212) 925-6635

**Counsel of Record*

RHONDA COPELON
ANDREW FIELDS
INTERNATIONAL WOMEN'S HUMAN RIGHTS LAW CLINIC
City University of New York
School of Law
65-21 Main Street
Flushing, New York 11367
(718) 340-4163

Counsel for Amici Curiae

February 9, 2005

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. COMPARATIVE AND INTERNATIONAL LAW PROVIDE STRONG PERSUASIVE AUTHORITY FOR INTERPRETING THE CONSTITUTIONAL ISSUES BEFORE THIS COURT 3

II. THE RIGHT OF WOMEN AND CHILDREN TO PROTECTION FROM AND EFFECTIVE REMEDIES FOR GENDER-BASED VIOLENCE, INCLUDING DOMESTIC VIOLENCE, HAS EVOLVED AS A CUSTOMARY NORM OF INTERNATIONAL LAW. 6

III. AS A STATE PARTY TO THE ICCPR, THE UNITED STATES' COMMITMENT TO ENSURE THE PROTECTION OF WOMEN AND CHILDREN FROM GENDER AND DOMESTIC VIOLENCE PROPERLY INFORMS THIS COURT'S INTERPRETATION OF THE DUE PROCESS CLAUSE AND THE AVAILABILITY OF A REMEDY UNDER 42 U.S.C. § 1983. 21

CONCLUSION.....29

TABLE OF AUTHORITIES

FEDERAL CASES

Atkins v. Virginia, 536 U.S. 304 (2002) 4

Bowers v. Hardwick, 478 U.S. 186 (1986).....3

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989) 6

District of Columbia v. Carter, 409 U.S. 418 (1973).....27

Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980) 15

Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).....15

Gideon v. Wainwright, 372 U.S. 335 (1963).....28

Grutter v. Bollinger, 539 U.S. 306 (2003).....3

Lawrence v. Texas, 539 U.S. 558 (2003).....2, 3

Mayer v. City of Chicago, 404 U.S. 189 (1991).....28

Miranda v. Arizona, 384 U.S. 436 (1966).....4

Mitchum v. Foster, 407 U.S. 225 (1972).....27

New York v. United States, 326 U.S. 572 (1946).....4

Ngiraingas v. Sanchez, 495 U.S. 182 27

Printz v. United States, 521 U.S. 898 (1997).....4

Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004) 7,20,25

The Nereide, 13 U.S. (9 Cranch) 388 (1815).....7

The Paquete Habana, 175 U.S. 677 (1900).....7

Thompson v. Oklahoma, 487 U.S. 815 (1988) 4

U.S. v. Pink, 315 U.S. 203 (1942).....21

United States v. Yousef, 327 F.3d 56 (2d Cir. 2003).....11

Washington v. Glucksberg, 521 U.S. 702 (1997) 4

Weinberger v. Rossi, 56 U.S. 25 (1982) 26

INTERNATIONAL CASES

Advisory Opinion OC-1/82 of Sept. 24, 1982, Inter-Am. Ct. H.R. (ser. A) No.1 (1982) 13

Airey v. Ireland, 32 Eur. Ct. H.R. (Ser. A) (1979) 20

M.C. v. Bulgaria, 2003-I Eur. Ct. H.R. 646 (2004).....19

M.Z. v. Bolivia, in Annual Report of the Inter-American Commission of Human Rights, Case No. 12.350, Inter-Am. C.H.R. 121 (Oct. 10, 2001).....20

Maria da Penha Maia Fernandes v. Brazil, in Annual Report of the Inter-American Commission on Human Rights, Case No. 12.051, Inter-Am. C.H.R. 704 (Apr. 16, 2001) 19, 20

R. v. Ewanchuk, [1999] 1 S.C.R. 330 (Can.) 5

State v. Baloyi, 2000 (1) BCLR 86 (CC) (S. Afr.) 5

Vishaka v. State of Rajasthan, [1997] 6 S.C.C. 241 (India) 5

CONSTITUTION, STATUTES AND REGULATIONS

U.S. Const. art. III, § 2, cl. 1 7

U.S. Const. art. VI, cl. 2 21

42 U.S.C. § 1983 ..... 2, 21, 27

Statute of the International Court of Justice, 59 Stat. 1055, 3 Bevans 1179 (1945) 8

OTHER FEDERAL AUTHORITIES

138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992) 9

Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (Dec. 10, 1998) 22

Understanding III(5), *U.S. Reservations, Declaration, Understandings, and Proviso, International Covenant on Civil and Political Rights*, 138 Cong. Rec. S4781-01 (1992) 23

United States Senate Report on Ratification of the International Covenant on Civil and Political Rights, S. Exec. Rep. No. 102-23 (1992) 21-25

UNITED NATIONS AND REGIONAL DOCUMENTS AND REPORTS

American Convention on Human Rights, 1144 U.N.T.S. 123 13

Beijing Declaration and Platform for Action, Fourth World Conference on Women, U.N. Doc. A/CONF.177/20 and A/CONF.177/20/Add.1 (1995) 17, 18

Committee of Ministers Recommendation Rec(2002)5 to Member States on the Protection of Women Against Violence, Comm. of Ministers, 794th meeting of the Ministers' Deputies, Council of Europe (Apr. 30, 2002) 14

Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 12: Violence Against Women* (8th Sess. 1989) 11

Committee on the Elimination of Discrimination Against Women, *General Recommendation 19: Violence Against Women* (11th Sess. 1992) 11, 12

Committee on the Elimination of Violence Against Women, *Concluding Observations/Comments* 12

Committee on the Rights of the Child, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child* (34th Sess. 2003) 13

Concluding Observations of the Human Rights Committee: United States of America, U.N. GAOR, Hum. Rts. Comm., U.N. Doc. A/50/40, CCPR/C/79/Add.50 (1995) 24

Consideration of Reports Submitted by States Parties Under Article 40: Initial Reports of States Parties Due in 1993: United States of America, Hum. Rts. Comm., Annex II, U.N. Doc. CCPR/C/81/Add.4 (1994) 24

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222 ..... 13, 14

Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 20378 ..... *passim*

Convention on the Rights of the Child, G.A. Res. 44/25, Annex, Supp. No. 49, U.N. Doc. A/44/49 (1989) 9, 12

Declaration on the Elimination of Violence Against Women: Resolution, G.A. Res. 104, U. N. GAOR, 48th Sess., Agenda Item 111, U.N. Doc. A/R es/48/104 20 (1993) 10, 15

European Parliament Resolution on Violence Against Women, Eur. Parl. Doc. A2-44186, 1986 O.J. (C176) 23 (July 14, 1986) 14

HRI/CORE/1/Add.49: *United States of America* (August 1994) 25-26

Human Rights Committee, *Concluding Observations/Comments* 10

Human Rights Committee, *General Comment No. 18: Non-Discrimination* (37th Sess. 1989) 10

Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (44th Sess. 1992) 10

Human Rights Committtee, *General Comment No. 28: Article 3 (The equality of rights between men and women)* (68th Sess. 2000) 10

Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the* Covenant (80th Sess. 2004) 9

Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, Report of the Special Rapporteur on Violence Against Women, its causes and consequences, U.N. ECOR, Hum. Rts. Comm. 59th Sess., U.N. Doc. E/CN.4/2003/75 (2003) 17

Inter-American Commission of Women, *Status of Signing and Ratification of the Convention of Belém do Pará* 13

Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, 33 I.L.M. 1534 ..... 13, 14

International Covenant on Civil and Political Rights, 993 U.N.T.S. 171 ..... *passim*

Observations of State Parties under article 40(5) of the Convention, United States of America, CCPR A/50/40/Vol. 1, Annex VI Pt. 4 26

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2d Ord. Sess. of the Assemb. of the Union 14

Report of the Special Rapporteur on Violence Against Women, its causes and consequences, U.N. ESCOR, Hum. Rts. Comm., 53rd Sess., U.N. Doc. E/CN.4/1997/47 (1997) 17

Report of the Special Rapporteur on Violence Against Women, its causes and consequences, U.N. ESCOR, Hum. Rts. Comm., 54th Sess., U.N. Doc. E/CN.4/1998/54 (1998) 17

Resolution Adopted by the General Assembly, U.N. GAOR, 33rd Special Sess, U.N. Doc. A/RES/S-23/2 (2000) 18

Resolution adopted by the General Assembly, Elimination of Domestic Violence Against Women, U.N. GAOR, 58th Sess., U.N. Doc. A/Res/58/147 (2004) 16

Summary of Record of the 1405th Meeting: United States of America, U.N. GAOR, Hum. Rts. Comm., 53rd Sess., U.N. Doc. CCPR/C/SR.1405 (1995) 24, 26

United Nations Charter 8

United Nations Development Fund for Women, *Bringing Equality Home: Implementing the Convention on the Elimination of All Forms of Discrimination Against Women* (Illana Landsberg-Lewis ed., 1998) 5

United Nations High Commissioner for Human Rights, Economic and Social Council Decision, U.N. ESCOR, 1994 Sub. Sess., 42nd Plen. Mtg., U.N. Doc. E/DEC/1994/254 (1994) 16-17

United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* (2004) 9, 11, 12

Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess. U.N. Doc. A/810 (1948) 8

Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 ..... 10, 11, 22

Vienna Declaration and Programme of Action, World Conference on Human Rights, U.N. Doc. A/CONF. 157/24 (Part I) (1993) 17

Violence Against Women: Report of the Secretary General, U.N., GAOR, 59th Sess., U.N. Doc. A/59/281 (2004) 18

Violence Against Women in the Family: Report of the Special Rapporteur on Violence Against Women, its causes and consequences, U.N. ESCOR, Hum. Rts. Comm., 55th Sess., U.N. Doc.E/CN.4/RES/1999/42 (1999) 17

World Health Organization, *World Report of Violence and Health* (Etienne G. Krug et al., eds. 2002) 18, 27

OTHER

Joan Fitzpatrick, *The Significance and Determination of Customary International Human Rights Law: Relevance of Customary International Norms to the Death Penalty in the United States*, 25 Ga. J. Int'l & Comp. L. 165 (1995/1996) 26

Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue, Address at the Fifty-First Cardozo Memorial Lecture* (Feb. 11, 1999), *in* 21 Cardozo L. Rev. 253 (1999) 4

Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 Colum. L. Rev. 2095 (1999) 25

Louis Henkin, *Foreign Affairs and the United States Constitution* (2d ed. 1996) 25

Louis Henkin, *Two Hundred Years of Constitutional Confrontations in the D.C. Courts*, 90 Geo. L.J. 725 (2002) 25

Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U. J. Int'l L. & Pol. 35 (1997) 22

Sandra Day O' Connor, *Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law* (Mar. 16, 2002), *in* 96 Am. Soc'y Int'l L. Proc. 348 (2002) 5

John Quigley, *Judge Bork is Wrong: The Covenant is the Law*, 71 Wash. U. L.Q. 1087 (1993) 25

Restatement of the Law (Third), Foreign Relations Law of the United States (1987) 7, 8, 22

Elizabeth M. Schneider, *Battered Women and Feminist Lawmaking* (2000) 6

David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. Davis L. Rev. 1 (2002) 25

INTEREST OF *AMICI CURIAE*

Amici curiae are international law scholars and women's, civil rights and human rights organizations,[1] all of whom recognize the world consensus that women and children have a fundamental human right to state protection from and remedies for domestic violence. *Amici* urge the Court to consider this strongly persuasive international authority to determine that Ms. Gonzales has a federal civil rights remedy for the Castle Rock police's violation of her right to due process in its enforcement of the mandatory restraining order issued by a Colorado court against her estranged husband, which led to her husband's murder of their three girls.

SUMMARY OF ARGUMENT

Ms. Gonzales' brief explains that the police failure to accord her due process in the enforcement of the protective order violated her constitutional right to due process of law. We concur in, but do not address, the legal arguments she makes. Rather, we explain that the principles expressed in the evolved international customary norm of protection from and remedies for domestic violence, as well as our obligations as a State Party to the International Covenant on Civil and Political

---

[1] Names and statements of interest of the individual *amici* are set forth in the attached Appendix. Letters from the parties consenting to the filing of *amicus curiae* briefs in this case are on file with the Clerk of Court. This brief was authored by the *amici* and counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than *amici* or their counsel made any monetary contributions to the preparation or submission of this brief.

Rights ("ICCPR"),[2] should inform this Court's consideration of the due process question at hand so as to grant Ms. Gonzales a federal remedy against the Town of Castle Rock.

This Court has repeatedly acknowledged that international and comparative law may be persuasive sources of authority for questions arising under our own Constitution. As it did in *Lawrence v. Texas*, 539 U.S. 558 (2003), this Court may appropriately consider the opinions of foreign jurisdictions in determining the scope of the Due Process Clause, and should also give due weight to other international sources of law. *Infra* Point I.

International human rights developments in recent decades have resulted in the emergence of a worldwide consensus that women and children have a fundamental human right to be protected from family violence, and to have effective remedies when such protection fails. This consensus is so powerful that it represents an evolved norm of customary international law -- a norm that provides additional persuasive authority to support a determination by this Court that Ms. Gonzales' due process rights were violated. *Infra* Point II.

Finally, the United States has ratified the ICCPR, a treaty whose terms are now recognized to encompass States Parties' obligations to ensure persons, particularly women and children, the right to freedom from domestic violence. Recognizing Ms. Gonzales' right of action under 42 U.S.C. § 1983 is both consistent with the federal obligations undertaken by ratifying that treaty and with

---

[2] International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 171 (entered into force Mar. 23, 1976) ("ICCPR").

the federalism understanding that accompanied it. *Infra* Point III.

For these additional reasons, the decision of the Tenth Circuit Court of Appeals should be affirmed.

ARGUMENT

I.

COMPARATIVE AND INTERNATIONAL LAW PROVIDE STRONG PERSUASIVE AUTHORITY FOR INTERPRETING THE CONSTITUTIONAL ISSUES BEFORE THIS COURT.

This Court's recent jurisprudence has affirmed that international and comparative law provide valuable interpretive guidance in areas of constitutional law. In *Lawrence v. Texas*, 539 U.S. 558, 576-78 (2003), this Court overruled its own precedent in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which held that the due process liberty interest in the United States Constitution did not encompass the right of homosexuals to engage in private, consensual, intimate conduct. The Court noted that the reasoning in *Bowers* had been explicitly rejected by the European Court of Human Rights and that "[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct" such that the right "has been accepted as an integral part of human freedom in many other countries." *Lawrence*, 539 U.S. at 576-77. *See also Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring, joined by Breyer, J.) (noting that the Court's opinion with regard to affirmative action "accords with the international understanding of the office of affirmative action" reflected in international

treaties). Similarly, in *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002), this Court examined the opinions of "the world community" to support its conclusion that execution of persons with mental retardation would offend the standards of decency required by the Eighth Amendment. And in *Washington v. Glucksberg*, 521 U.S. 702 (1997), in ruling that the State of Washington's statute prohibiting assisted suicide was not invalid on its face under the Due Process Clause of the Fourteenth Amendment, the Court noted that Canada, Great Britain, New Zealand and Australia had rejected efforts to establish a fundamental right to assisted suicide. *Id.* at 718 n.16.[3]

International and foreign law rulings on constitutional issues facing the Court "cast an empirical light on the consequences of different solutions to a common legal problem." *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting). As Justice Ginsburg has observed, "comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights." Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue, Address at the Fifty-First Cardozo Memorial Lecture* (Feb. 11, 1999), *in* 21 Cardozo L. Rev. 253, 282 (1999). And as Justice O'Connor has stated: "While ultimately we must bear

[3] *See also Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (Stevens, J.) (looking to opinions of "other nations that share our Anglo-American heritage" and "leading members of the Western European community" as aids to deciding Eighth Amendment question); *Miranda v. Arizona*, 384 U.S. 436, 521-23 (1966) (considering law enforcement "experience . . . [in] other countries" in interpreting Fifth Amendment); *New York v. United States*, 326 U.S. 572, 584 n.5 (1946) (looking to constitutional experiences of other countries to help decide scope of federal taxation power).

responsibility for interpreting our own laws, there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here." Sandra Day O' Connor, *Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law* (Mar. 16, 2002), *in* 96 Am. Soc'y Int'l L. Proc. 348, 350 (2002).

In grappling with constitutional issues of the human right to state protection of women and children from, and remedies for, gender-based violence and discrimination, high courts of other countries have accorded substantial weight to the obligations set forth in various international human rights instruments.[4]

[4] *See, e.g., R. v. Ewanchuk*, [1999] 1 S.C.R. 330 (Can.) (determining that there is no defense of "implied consent" to a sexual assault charge by interpreting Canadian sexual assault laws and the Canadian Charter of Rights and Freedoms in light of guarantees under the international women's rights convention and other international norms); *Vishaka v. State of Rajasthan*, [1997] 6 S.C.C. 241, ¶¶ 5-10 (India) (determining that the Indian Constitution's guarantee of equality for women should be interpreted in light of "global acceptance" of the principle that "[g]ender equality includes protection from sexual harassment," as reflected in international instruments, and finding that the complete absence of a sexual harassment law and damages remedy violated these norms and constitutional guarantees). *See also State v. Baloyi*, 2000 (1) BCLR 86, ¶ 26 (CC) (S. Afr.) (upholding a statutory interdict (restraining order), mandatory arrest, and subsequent criminal conviction and sentencing procedure for violations of the interdict, and reasoning that the interdict procedure ensures South Africa's compliance with its obligations under various international treaties to protect women from domestic violence). *See generally* United Nations Development Fund for Women, *Bringing Equality Home: Implementing the Convention on the Elimination of All Forms of Discrimination Against Women* pt. 2 (Illana Landsberg-Lewis ed., 1998) (summarizing these and other domestic court decisions that rely on international instruments to analyze and apply domestic protection from gender discrimination, including violence against women).

Wisdom gleaned from the opinions of judicial colleagues in foreign jurisdictions, together with a developed international consensus mandating state protection from and remedies for domestic violence, can assist this Court in reaching sound conclusions under domestic law. This is particularly true here, given that the recent and rapid crystallization of the human right of women and children to state protection from gender-based violence is a worldwide phenomenon which post-dates this Court's 1989 decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989).[5]

II.

THE RIGHT OF WOMEN AND CHILDREN TO PROTECTION FROM AND EFFECTIVE REMEDIES FOR GENDER-BASED VIOLENCE, INCLUDING DOMESTIC VIOLENCE, HAS EVOLVED AS A CUSTOMARY NORM OF INTERNATIONAL LAW.

In recent decades, international human rights treaties and other authoritative international agreements have underscored the systemic and grave nature of domestic violence and given rise to an evolved customary norm of international law that recognizes the right of persons, particularly women and children, to protection from and compensation for such violence. This Court recently reaffirmed that customary

[5] *See generally* Elizabeth M. Schneider, *Battered Women and Feminist Lawmaking* 53 (2000) ("[c]ompared with the history of women's rights struggles in the United States and around the world, the development of feminist approaches to international human rights is a recent phenomenon" that "has exploded" in the last twenty years).

international law, or the "law of nations," is part of the "laws" of the United States pursuant to Article III, section 2, clause 1 of the U.S. Constitution.[6] Without reaching the question whether the norm concerning family violence would sustain a cause of action under the standards this Court recently set forth in the context of the Alien Tort Claims Act, *see Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2765-66 (2004), this Court can, and should, consider the abundant evidence of this norm as at least highly persuasive authority that merits deep consideration.

Customary international law constitutes "specific, universal and obligatory" "customs and usages of civilized nations." *Sosa*, 124 S. Ct. at 2766-67. It "results from a general and consistent practice of states followed by them from a sense of legal obligation." *Restatement of the Law (Third), Foreign Relations Law of the United States* § 102(2) (1987). Under established principles, evidence tending to show customary international human rights law includes:

> [1] virtually universal participation of states in the preparation and adoption of international agreements recognizing human rights principles generally, or particular rights;

[6] *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2764-65 (2004) ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations"); *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."). *See also The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815).

> [2] the adoption of human rights principles by states and in regional organizations in Europe, Latin America, and Africa;
>
> [3] general support by states for United Nations resolutions declaring, recognizing, invoking, and applying international human rights principles as international law;
>
> [4] action by states to conform their national law or practice to standards or principles declared by international bodies; [and]
>
> [5] invocation of human rights principles in national policy, in diplomatic practice, in international organization activities and actions. . . .

Id. § 701, Reporter's Notes ¶ 2. *See also* Statute of the International Court of Justice, art. 38, 59 Stat. 1055, 3 Bevans 1179 (1945).

As to the first category, over the last two decades, as the United Nations has expounded upon the basic international human rights recognized in the United Nations Charter[7] and the Universal Declaration of Human Rights[8] in the 1940s, it has made clear that these rights encompass the right of women and children to be free from violence, including domestic violence, and that

[7] *See U.N. Charter*, arts. 1(3), 55(c), 56.

[8] The 1948 Universal Declaration of Human Rights states that "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law," and "[e]veryone has the right to an effective [domestic] remedy . . . for acts violating the fundamental rights granted [ ] by the constitution or by law." Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., arts. 3-8, 12, 16-19, 22-24 at 71, U.N. Doc. A/810 (1948).

nations have an affirmative obligation to protect that right.

At least three widely-ratified international human rights treaties recognize the right to state protection from and remedies for domestic violence, and thus constitute compelling evidence of an emergent international norm. These are the International Covenant on Civil and Political Rights ("ICCPR") (ratified by 152 states), the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") (ratified by 177 states), and the Convention on the Rights of the Child ("CRC") (ratified by 192 states).[9]

Each party to the ICCPR, including the United States,[10] agrees to "respect and [] *ensure* to all individuals within its territory . . . the rights recognized in the present Covenant." Art. 2(1) (emphasis added).[11] Although the

[9] *See* United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties*, (2004), *available at* http://www.unhchr.ch/pdf/report.pdf (last visited February 6, 2005) ("*Status of Ratifications*").

[10] 138 Cong. Rec. S4781-01 (daily ed. Apr. 2, 1992).

[11] The obligation to "ensure" involves "tak[ing] the necessary steps . . . to give effect to the[se] rights"; "ensur[ing] an effective remedy . . . determined by competent judicial, administrative or legislative authorities . . . [or] develop[ing] the possibilities of a judicial remedy"; and "ensur[ing] that the competent authorities shall enforce such remedies when granted." ICCPR, art. 2. The Human Rights Committee, the body charged with interpreting the ICCPR and monitoring States Parties' compliance thereto, *see* ICCPR, art. 40, has repeatedly emphasized that the obligation to "ensure" under Article 2 embraces the responsibility of the state to prevent harm by private as well as official actors. Hum. Rts. Comm., *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (80th Sess. 2004), *reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 12/05/2004, U.N. Doc. HRI/GEN/1/Rev. 7 ("*Compilation*") at 192 *et seq.* (replacing General

right to protection from domestic and gender-based violence is not explicit in the ICCPR, the Human Rights Committee has recognized since the early 1990s,[12] and States Parties hav . accepted,[13] that the ICCPR applies to

Comment No. 3). *See also Compilation,* Hum. Rts. Comm., *General Comment No. 18: Non-Discrimination* (37th Sess. 1989) ¶ 9 ("discrimination . . . by public authorities, by the community, or by private persons or bodies"); *Compilation,* Hum. Rts. Comm., *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (44th Sess. 1992) ¶ 2 (requires state protection against torture and ill treatment, "whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity").

[12] The Human Rights Committee has identified protection from various forms of violence and subordination in the family as implicit under various articles of the ICCPR, including articles 6, 7, 12, 18 and 24 that protect the rights to: life; freedom from torture or cruel, inhuman or degrading treatment or punishment; liberty of movement and freedom to choose one's residence; freedom of thought, conscience, and religion; and the rights of children to protection without discrimination. *Compilation,* Hum. Rts. Comm., *General Comment No. 28: Article 3 (The equality of rights between men and women)* (68th Sess. 2000) ¶¶ 10, 11, 14, 16, 21. Since the early 1990s violence against women, including domestic violence, has been a frequent subject of monitoring and reporting by States Parties to the ICCPR. *See, e.g.,* Hum. Rts. Comm., *Concluding Observations/Comments, available at* http://www.unhchr.ch/tbs/doc.nsf (last visited February 6, 2005).

[13] Significantly, the General Assembly's Declaration on the Elimination of Violence Against Women reflects a universally accepted interpretation of the ICCPR as a source of the state obligation to prohibit gender-based violence, in public and private life. Declaration on the Elimination of Violence Against Women: Resolution, G.A. Res. 104, U.N. GAOR, 48th Sess., Agenda Item 111, at preamble, art. 3, U.N. Doc. A/Res/48/104 20 (1993). *See generally* Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, U.N. Doc. A/Conf. 39/27 at 289 (1969), 1155 U.N.T.S. 331 ("Law of Treaties") (a treaty is interpreted according to the "ordinary meaning" of its terms in their "context[s] and in light of its object and purpose"; moreover, subsequent agreements, state practice and relevant rules of international law are principal sources of interpretation). *See United*

and requires both prevention and remedies for gender and domestic violence.

An international treaty broadly focused on the rights of women, CEDAW[14] condemns "discrimination against women in all its forms" and requires parties to "ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination."[15] The United Nations Committee charged with interpreting CEDAW ("CEDAW Committee") stated that "gender-based violence [including specifically within family relationships] is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms" [16] and recommended that States Parties "ensure that laws against family violence and abuse . . . give adequate protection to women."[17] The CEDAW Committee reminded States Parties that CEDAW calls on them to eliminate discrimination against women by state and private actors, and that states may be liable for private

States v. Yousef, 327 F.3d 56, 95 n.28 (2d Cir. 2003) (United States has only signed the Law of Treaties; nonetheless, "the U.S. Department of State long has taken the position that 'the Convention is . . . the authoritative guide to current treaty law and practice'").

[14] Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, G.A. Res. 34/180, 34 U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979) (entered into force Sept. 3, 1981) ("CEDAW"). The United States has signed but not ratified CEDAW. *See Status of Ratifications, supra.* As a signatory to CEDAW, the United States "is obliged to refrain from acts which would defeat [its] object and purpose." *See* Law of Treaties, *supra,* art. 18.

[15] CEDAW, *supra,* art. 2(c).

[16] *Compilation,* CEDAW Comm., *General Recommendation No. 19: Violence Against Women* (11th Sess. 1992) ¶ 1. *See also Compilation,* CEDAW Comm., *General Recommendation No. 12: Violence Against Women* (8th Sess. 1989).

[17] *Id.* ¶ 24(b).

acts of violence if they fail to act with "due diligence" to prevent, investigate, or punish such violence.[18] Accordingly, state efforts to provide legal and social protection against gender-based violence have been a consistent focus of the CEDAW Committee's monitoring of state reporting.[19]

The Convention on the Rights of the Child ("CRC")[20] requires further protection from domestic violence for children. *See* art. 6 (requiring States Parties to ensure "the survival and development of the child"); art. 19 ("states Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse . . . while in the care of parent(s), legal guardian(s) or any other person who has the care of the child"). Under Article 2, States Parties are required to "ensure" the rights in the CRC "without discrimination of any kind, irrespective of the child's . . . sex." The Committee on the Rights of the Child has said that States Parties must "ensur[e] that all domestic legislation is fully compatible with the Convention and

[18] *Compilation*, CEDAW Comm., *General Recommendation No. 19, supra*, ¶ 9. This CEDAW Committee recommendation calls on States Parties to ensure that laws against family violence and other forms of gender-based violence are adequate, *id.* ¶ 24(b); to provide effective complaint procedures and remedies, including compensation, *id.* ¶ 24(i); and to provide criminal penalties and civil remedies in case of domestic violence, *id.* ¶ 24(r)(i).

[19] *See* Committee on the Elimination of Violence Against Women, *Concluding Observations/Comments*, *available at* http://www.unhchr.ch/tbs/doc.nsf (last visited February 6, 2005).

[20] Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, G.A. Res. 44/25, Annex, Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989) (entered into force Sept. 2, 1990). Only the United States and Somalia have signed but not ratified this Convention. *See Status of Ratification, supra*.

that the Convention's principles and provisions can be directly applied and appropriately enforced."[21]

Considering the second type of evidence of customary human rights law, regional treaties and declarations also show development of the universal consensus that states must respect and enforce the right to protection from gender-based violence, including domestic violence. Several regional treaties, including the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará"),[22] the Convention for the Protection of Human Rights and Fundamental Freedoms

[21] *Compilation*, Comm. On Rts. Of Child, *General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child* (34th Sess. 2003) ¶ 1.

[22] Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *opened for signature* June 9, 1994, 33 I.L.M. 1534 (entered into force Mar. 5, 1995) ("Convention of Belém do Pará"). The Convention of Belém do Pará has been ratified by 31 out of 34 Inter-American states, not including the United States. *See* Inter-American Commission of Women, *Status of Signing and Ratification of the Convention of Belém do Pará*, *available at* http://www.oas.org/cim/English/Laws.Rat.Belem.htm (last visited February 6, 2005). Nonetheless, the United States' membership in the Organization of American States and its adherence to the American Declaration on the Rights and Duties of Man ("Declaration") obligate it to promote the right to protection from gender-based and domestic violence, as the Convention of Belém do Pará is based on the rights articulated in the Declaration and the American Convention on Human Rights, which the United States has signed. American Convention on Human Rights, *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July, 18, 1978); *see also* Advisory Opinion OC-1/82 of Sept. 24, 1982, ¶ 41, Inter-Am. Ct. H.R. (ser. A) No.1 (1982).

("European Convention"),[23] and the Protocol on the Rights of Women in Africa to the African Charter on Human and Peoples' Rights ("African Protocol")[24] recognize women's right to be free from gender-based violence, including domestic violence; that states must undertake "due diligence" to prevent, investigate, and punish such acts of violence, whether perpetrated by a state or private actor; and to provide compensation and legal recourse for victims of such violence.[25]

Likewise, the Council of Europe's Committee of Ministers has issued a Recommendation reaffirming its "determination to combat violence against women" and "recognis[ing] that states have an obligation to exercise due diligence."[26] The Committee of Ministers further reaffirmed a 1986 European Parliament Resolution recommending that member states ensure victims receive compensation and consider, *inter alia*, the use of protective orders.[27]

---

[23] Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

[24] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, *opened for signature* July 11-August 13, 2003, 2d Ord. Sess. of the Assemb. of the Union, *available at* http://www1.umn.edu/humanrts/africa/protocol=women2003.html (last visited February 6, 2005).

[25] *See* Convention of Belém do Pará, *supra*, arts. 3, 4, and 7; European Convention, *supra*, arts. 1, 8, and 13; African Protocol, *supra*, arts. 4 and 8.

[26] *Comm. of Ministers Recommendation Rec(2002)5 to Member States on the Protection of Women Against Violence*, at 3, 5, Comm. of Ministers, 794th meeting of the Ministers' Deputies, Council of Europe (Apr. 30, 2002).

[27] *Id., App. A*, ¶¶ 36, 58. *See also* European Parliament Resolution on Violence Against Women, ¶ 13, *Eur. Parl. Doc.* A2-44186, 1986 O.J. (C176) 23 (July 14, 1986) (calling on national authorities to "ensure that, in cases where the facts of violence have been established, victims receive appropriate compensation for any pecuniary, physical, psychological, moral and social damage suffered," to consider "enabl[ing] the judiciary to adopt, as interim measures aimed at protecting victims, the banning of a perpetrator from contacting, communicating with or approaching the victim, residing in or entering certain defined areas" and "to ensure improvements in training of police officers dealing with . . . reports of sexual violence," including requiring the police "to respond actively when requests of help are received").

The "general assent of nations" to the right to protection against family violence is demonstrated by United Nations consensus documents, the third type of evidence of customary human rights law.[28] In particular, the 1993 General Assembly Declaration on the Elimination of Violence Against Women, adopted by consensus, is specific and comprehensive, not only recognizing the right to protection from family violence,

---

[28] While technically not binding under the United Nations Charter, widely accepted General Assembly Declarations and Resolutions may constitute authoritative statements of the world community and thus contribute to the development of custom. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980):

> [Declarations] specify with great precision the obligations of member nations under the Charter . . . . [and constitute] a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated . . . . Thus, a Declaration creates an expectation of adherence, and insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States.

(internal quotations and citations omitted). *See also Fernandez v. Wilkinson*, 505 F. Supp. 787, 796 (D. Kan. 1980) ("There are a great number of other international declarations, resolutions, and recommendations. While not technically binding, these documents establish broadly recognized standards.").

but also calling upon states, in specific terms, to exercise due diligence.[29] The United Nations General Assembly subsequently adopted a detailed Resolution that "requires States to take serious action to protect victims and prevent domestic violence."[30]

The United Nations also has undertaken many other initiatives to encourage states to ensure the right to protection from and remedies for domestic violence. For example, in 1994, the United Nations Commission on Human Rights appointed the first U.N. Special Rapporteur on Violence Against Women to analyze and document the phenomenon, and hold governments accountable for violations against women. *See* U.N. High Comm'r for Human Rights Econ. and Soc. Council Decision, U.N. ESCOR, 1994 Sub. Sess., 42nd Plen.

---

[29] Declaration on the Elimination of Violence Against Women, *supra* note 13, arts. 1, 2 (recognizing the right to be free from violence, and that "violence against women" includes "[p]hysical, sexual and psychological violence occurring in the family, including battering"); art. 4 (calling upon states to "pursue by all appropriate means and without delay a policy of eliminating violence against women," including "exercis[ing] due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or private persons").

[30] Resolution adopted by the General Assembly, Elimination of Domestic Violence Against Women, U.N. GAOR, 58th Sess., ¶ 1(d), U.N. Doc. A/Res/58/147 (2004). The Resolution stresses "that States have an obligation to exercise due diligence . . . and to provide protection to the victims," *id.* ¶ 5, including specifically, to "establish[] adequate legal protection against domestic violence"; "ensure greater protection for women, *inter alia*, by means of, where appropriate, orders restraining violent spouses from entering the family home"; "establish and/or strengthen police response protocols and procedures"; and "take measures to ensure the protection of women subjected to violence, access to just and effective remedies, *inter alia*, through compensation and indemnification and healing of victims." *Id.* ¶¶ 7(a), (e), (i), (j).

Mtg., U.N. Doc. E/DEC/1994/254 (1994). Her Reports have been the basis for the Commission's annual resolutions emphasizing states' obligations to eliminate violence against women in all contexts, including in the home.[31]

Moreover, United Nations World Conferences have condemned gender violence as a human rights violation and called for international and national remedies, in particular, the 1993 Vienna World Conference on Human Rights[32] and the 1995 Fourth World Conference on Women in Beijing.[33]

---

[31] For Reports on domestic violence in the home, *see Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, Report of the Special Rapporteur on Violence Against Women, its causes and consequences*, U.N. ECOR, Hum. Rts. Comm. 59th Sess., U.N. Doc. E/CN.4/2003/75 (2003) ("2003 *Special Rapporteur Report*"); *Violence Against Women in the Family: Report of the Special Rapporteur on Violence Against Women, its causes and consequences*, U.N. ESCOR, Hum. Rts. Comm., 55th Sess., U.N. Doc.E/CN.4/RES/1999/42 (1999); *Report of the Special Rapporteur on Violence Against Women, its causes and consequences*, U.N. ESCOR, Hum. Rts. Comm., 54th Sess., U.N. Doc. E/CN.4/1998/54 (1998); *Report of the Special Rapporteur on Violence Against Women, its causes and consequences*, U.N. ESCOR, Hum. Rts. Comm., 53rd Sess., U.N. Doc. E/CN.4/1997/47 (1997).

[32] The Vienna Declaration and Programme of Action recognized gender violence as a human rights violation and triggered system-wide as well as national reforms designed to eliminate gender violence and advance the human rights of women. *Vienna Declaration and Programme of Action*, World Conference on Human Rights, at ¶ 18, U.N. Doc. A/CONF. 157/24 (Part I) (1993).

[33] *Beijing Declaration and Platform for Action*, Fourth World Conference on Women, at Annex I, ch. IV ¶¶ 125-30, U.N. Doc. A/CONF.177/20 and A/CONF.177/20/Add.1 (1995). Significantly, the consensus Beijing Platform included the elimination of all forms of violence against women as one of its twelve strategic objectives, and called for states to ensure the right of women to be free from violence by, *inter alia*, providing "women who are subjected to

The emergence of an international customary norm is further illustrated by the rapid, world-wide reform of laws and practices to provide protection against gender and domestic violence, the fourth category of relevant evidence. Recent international surveys indicate that states are adopting a range of protective measures, including protective orders, to prevent domestic violence,[34] and that there is increasing recognition of the importance of effective enforcement of restraining orders such as that at issue here.[35]

Finally, the decisions of international human rights courts and commissions determining that women's international human rights were violated by state failure to provide or enforce fair and effective protections against gender-based violence, including domestic violence, provide the fifth type of evidence for this customary human rights norm.

violence with access to the mechanisms of justice and . . . to just and effective remedies for the harm they have suffered." *Id.* at ¶ 125(h). The United Nations reaffirmed its commitment to eliminating violence against women as outlined in the Beijing Declaration and Platform in the Resolution Adopted by the General Assembly ¶ 2, U.N. GAOR, 33rd Special Sess, U.N. Doc. A/RES/S-23/2 (2000).

[34] *See generally Violence Against Women: Report of the Secretary General,* U.N., GAOR, 59th Sess., U.N. Doc. A/59/281 (2004) (*"Sec'y Gen. VAW Report"*); 2003 *Special Rapporteur Report, supra*; World Health Organization, *World Report of Violence and Health* 105 (Etienne G. Krug et al., eds. 2002) (*"WHO World Report"*).

[35] *See, e.g.*, 2003 *Special Rapporteur Report, supra*, at ¶ 1857; *WHO World Report, supra*, at 105; *Sec'y Gen. VAW Report, supra*, at ¶ 65 ("Women victims of violence, or women who are at risk of repeated acts of violence in the home, should have immediate means of redress and protection, including protection or restraining orders, access to legal aid, and shelters staffed with personnel who are sensitive to victims' needs.").

In *M.C. v. Bulgaria,* 2003-I Eur. Ct. H.R. 646 ¶¶ 185-87 (2004), the European Court of Human Rights held that Bulgaria violated the rights of a 14-year-old alleged rape victim to be free from inhuman or degrading treatment and to privacy guaranteed under Articles 3 and 8 of the European Convention by failing to investigate the alleged rapes fully and effectively.[36] The court awarded M.C. compensation for "distress and psychological trauma," resulting "at least partly from the shortcomings in the authorities' approach" to the criminal investigation. *Id.* ¶¶ 191, 194.

Likewise, in *Maria da Penha Maia Fernandes v. Brazil, in Annual Report of the Inter-American Commission on Human Rights*, Case No. 12.051, Inter-Am. C.H.R. 704, OEA/Ser. L/V/II.111 doc. 20 rev. (Apr. 16, 2001), the Inter-American Commission on Human Rights concluded that Brazil had violated Ms. Fernandes' rights under the Convention of Belém do Pará, arts. 3 and 4, by delaying for more than 15 years the prosecution of her abusive husband for her attempted murder, noting that "this violation form[ed] a pattern of discrimination evidenced by the condoning of domestic violence against women in Brazil through ineffective judicial action." *Id.* ¶ 3. The Commission therefore recommended "prompt

[36] The court concluded that "the approach taken by the investigator and prosecutors in the case fell short of the requirements inherent in the States' positive obligations – viewed in the light of the relevant modern standards in comparative and international law – to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse." *M.C. v. Bulgaria,* 2003-I Eur. Ct. H.R. 646 ¶ 187 (2004). The court further acknowledged that "[w]hile the choice of the means to secure compliance with [international human rights law] . . . is in principle within the State's margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions." *Id.* ¶ 150.

and effective compensation for the victim, and the adoption of measures at the national level to eliminate tolerance by the State of domestic violence against women." *Id.*[37]

Taken together, these international and regional treaties and other documents evidencing state practice establish that state failure to provide effective protection from domestic violence is recognized as a "specific, universal and obligatory" violation of human rights throughout the world, *see Sosa*, 124 S. Ct. at 2766-67, that gives rise to a right to compensation. This international consensus, reflecting an evolved customary norm of international law, lends further and compelling support for interpreting the Due Process Clause to permit Ms. Gonzales to pursue her federal civil rights claim in this case.

[37] *See also Airey v. Ireland*, 32 Eur. Ct. H.R. (Ser. A) ¶¶ 9, 24, 28 (1979) (holding that Ireland violated right to access to court for a decree of separation from woman's abusive and alcoholic husband by failing to provide her with legal aid to do so); *MZ v. Bolivia, in Annual Report of the Inter-American Commission of Human Rights*, Case No. 12.350, Inter-Am. C.H.R. 121, OEA/Ser. L/V/II.114 doc. 5 rev. (Oct. 10, 2001) (determining that, if the allegations concerning the judicial overturning of a rape conviction in the face of overwhelming evidence were true, violations of the Inter-American Convention by Bolivia would be established); cases cited *supra* note 4.

III.

AS A STATE PARTY TO THE ICCPR, THE UNITED STATES' COMMITMENT TO ENSURE THE PROTECTION OF WOMEN AND CHILDREN FROM GENDER AND DOMESTIC VIOLENCE PROPERLY INFORMS THIS COURT'S INTERPRETATION OF THE DUE PROCESS CLAUSE AND THE AVAILABILITY OF A REMEDY UNDER 42 U.S.C. § 1983.

The United States' ratification of the ICCPR, which largely parallels the Bill of Rights,[38] supports the Court's determination in this case that the police deprived Ms. Gonzales and her children of due process in their enforcement of the mandatory protective order. As set forth in Point II, *supra*, the ICCPR commits States Parties to ensure women's and children's right to protection from gender and domestic violence and to provide effective remedies for violations by official and private actors. Considering this case in light of the ICCPR highlights the contemplated, complementary and essential role of the federal courts in promoting this right through the section 1983 remedy.[39]

As a ratified treaty, the ICCPR constitutes "a 'Law of the Land' under the Supremacy Clause, Art. VI, Cl. 2, of the Constitution," *see U.S. v. Pink*, 315 U.S. 203, 230 (1942), which implements the fundamental international

[38] *United States Senate Report on Ratification of the International Covenant on Civil and Political Rights*, S. Exec. Rep. No. 102-23, at 2 (1992) ("The rights guaranteed by the Covenant are similar to those guaranteed by the U.S. Constitution and the Bill of Rights").

[39] As discussed below, the Senate's reservations, understandings and declarations to the ICCPR do not undermine, but rather support, this Court's authority to consider the treaty as persuasive authority.

principle of *pacta sunt servunda* that "every treaty in force is binding upon the parties to it and must be performed by them in good faith." Law of Treaties, *supra*, art. 26. As Justice O'Connor has noted, "domestic courts should faithfully recognize the obligations imposed by international law. The Supremacy Clause of the United States Constitution gives legal force to foreign treaties, and our status as a free nation demands faithful compliance with the law of free nations." Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U. J. Int'l L. & Pol. 35, 42 (1997).[40]

Under both ICCPR article 50 and international law, the United States may, as a federal state, relegate different functions to its constituent parts, but concurrently it must ensure that the treaty is fully effective throughout its territory.[41] Consistent with this obligation, the U.S. Senate did not take a reservation to ICCPR art. 50.[42] Rather, it ratified the ICCPR with the

[40] *See also* Exec. Order No. 13,107, 63 Fed. Reg. 68,991 § 1 (Dec.10, 1998) (stating that "[i]t shall be the policy and practice of the Government of the United States . . . fully to respect and implement its obligations under the international human rights treaties to which it is a party, including the ICCPR").

[41] ICCPR, *supra*, art. 50 provides: "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions." *See generally* Law of Treaties, *supra*, art. 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."); *id.* art. 29 ("[u]nless a different intention appears from the treaty . . . a treaty is binding upon each party in respect of its entire territory"); *The Restatement of the Law (Third), Foreign Relations Law of the United States* § 207(b) (1987) (a federal state "is responsible for any violation of its obligations under international law resulting from action or inaction by the government or authorities of any political subdivision of the state").

[42] The Senate considered a reservation to article 50 "not necessary . . . since the intent is not to modify or limit U.S. undertakings under the

following express understanding (the "federalism understanding"):

> That the United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Convention.

Understanding III(5), *U.S. Reservations, Declaration, Understandings, and Proviso, International Covenant on Civil and Political Rights*, 138 Cong. Rec. S4781-01 (1992).

The Senate explained, as did the Administration's 1994 Report to the United Nations Human Rights Committee (the "1994 Report"), that this understanding was intended "to emphasize domestically that there is no intent to alter the constitutional balance of authority between the State and Federal governments" and "to signal to our treaty partners that the U.S. will implement its obligations under the Covenant by appropriate legislative, executive and *judicial* means, *federal* or state

Covenant but rather to put our future treaty partners on notice with regard to the implications of our federal system concerning implementation." S. Exec. Rep. No. 102-23 at 18.

as appropriate."[43] When presenting the 1994 Report to the Human Rights Committee, the U.S. spokesperson stated that while federalism concerns would not permit the federal government to obligate the states to undertake particular action -- such as "dictat[ing] the basic form or internal workings of state government" -- federal responsibility did extend to "*enforc[ing] uniform standards* for the respect of civil and political rights."[44]

The Senate also attached a non-self-executing declaration as to ICCPR articles 1-27, stating:

> For reasons of prudence, we recommend including a declaration that the substantive provisions of the Covenant are not self-executing. The intent is to clarify that the *Covenant will not create a private cause of action in U.S. courts . . . . [E]xisting U.S. law generally complies with the Covenant; hence, implementing legislation is not contemplated.*

S. Exec. Rep. No. 102-23 at 18-19 (emphasis added).

---

[43] S. Exec. Rep. No. 102-23 at 19-20 (emphasis added). *See also Consideration of Reports Submitted by States Parties Under Article 40: Initial Reports of States Parties Due in 1993: United States of America*, Hum. Rts. Comm., Annex II, ¶ I-III, U.N. Doc. CCPR/C/81/Add.4 (1994).

[44] *Summary of Record of the 1405th Meeting: United States of America*, U.N. GAOR, Hum. Rts. Comm., 53rd Sess. ¶ 10, U.N. Doc. CCPR/C/SR.1405 (1995) (emphasis added). Significantly, the Human Rights Committee noted "with satisfaction the assurances of the [United States] Government that its declaration regarding the federal system is not a reservation and is not intended to affect the international obligations of the United States." *Concluding Observations of the Human Rights Committee: United States of America*, U.N. GAOR, Hum. Rts. Comm. ¶¶ 266-304, U.N. Doc. A/50/40, CCPR/C/79/Add.50 (1995).

Given this Senate recognition of the relevance of existing U.S. law to the rights protected by the ICCPR, and the Senate commitment to employ "appropriate legislative, executive and judicial means, federal or state as appropriate" in service of the ICCPR, S. Exec. Rep. No. 102-23 at 19-20, it is reasonable to assume that the Senate contemplated that achieving compliance with the treaty's terms could require the use of already-existing domestic rights and remedies, and moreover, in light of the federalism understanding, that such remedies could include federal civil rights remedies.[45]

In considering the weight that the ICCPR commands in this context, it is useful to recognize that the non-self-executing declaration does not undermine this Court's authority to consider the ICCPR in deciding this section 1983 claim.[46] In reporting to the Human Rights Committee, the United States stated: "The [self-executing] distinction is one of domestic law only; in either case, the treaty remains binding on the United States as a matter of international law." HRI/CORE/1/Add.49: *United States of America*, ¶ 138

---

[45] This reading of the non-self-executing declaration is entirely consistent with this Court's ruling in *Sosa* that by virtue of the non-self-executing declaration "the [Covenant] did not *itself* create obligations enforceable in the federal courts." 124 S. Ct. at 2767 (emphasis added).

[46] The validity of such declarations has been sharply criticized, however, including on constitutional grounds. *See, e.g.*, Louis Henkin, *Foreign Affairs and the United States Constitution* 201-03 (2d ed. 1996); Louis Henkin, *Two Hundred Years of Constitutional Confrontations in the D.C. Courts*, 90 Geo. L. J. 725, 733-34 (2002); Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 Colum. L. Rev. 2095 (1999); David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. Davis L. Rev. 1, 45-76 (2002); John Quigley, *Judge Bork is Wrong: The Covenant is the Law*, 71 Wash. U. L.Q. 1087, 1101-1102 (1993).

(August 1994). The United States representative affirmed this view in response to the Human Rights Committee's concerns regarding the declaration, stating: "[t]o clarify an apparent misunderstanding, the courts [of the United States] could refer to the Covenant and take guidance from [the Covenant] even though it was not self executing. What the Covenant could not do was provide a cause of action." *Summary of Record of the 1405th Meeting: United States of America*, U.N. GAOR, Hum. Rts. Comm., 53rd Sess. ¶ 8, U.N. Doc. CCPR/C/SR.1405 (1995) (Remarks of Conrad Harper).[47] Thus, the non-self-executing declaration neither nullifies the binding nature of the ICCPR nor the appropriateness of federal judicial attention to the treaty; nor does it disturb the fundamental principle, embodied in the Supremacy Clause, that absent irreconcilable conflict, international law carries great weight in the interpretation of domestic law.[48]

---

[47] *See also Observations of State Parties under article 40(5) of the Convention, United States of America*, CCPR A/50/40/Vol. 1, Annex VI Pt. 4 (if a state party "lacks any means under its domestic law by which Covenant rights may be enforced. . . such an approach would not, of course, be consistent with the fundamental principle of *pacta sunt servunda*").

[48] The principle, most often discussed in relation to customary international law, applies with at least equal rigor to treaty commitments. *See Weinberger v. Rossi*, 56 U.S. 25, 32 (1982) ("It has been a maxim of statutory construction since the decision in *Murray v. The Charming Betsy*, 2 Cranch 64, 118 [6 U.S. 64, 118] (1804), that 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . . .'"); *see also* Joan Fitzpatrick, *The Significance and Determination of Customary International Human Rights Law: Relevance of Customary International Norms to the Death Penalty in the United States*, 25 Ga. J. Int'l & Comp. L. 165, 179-180 (1995/1996) (explaining that courts should interpret constitutional norms consistently with international norms because "[n]ot only does this approach help insure the international law-abiding character of the United States, it helps to avoid a clash between two important interpretive principles -- that statutes should be construed where possible, to be consistent with the Constitution and with international law").

Turning to the case before this Court, here, Colorado sought to protect Ms. Gonzales and her children from domestic violence through a mandatory restraining order. Colorado failed in its obligations only when the police failed to accord her due process in enforcing the order.[49] In light of our treaty obligations and the federalism understanding, it is appropriate for this Court to interpret the Constitution to require due process in the enforcement of a mandatory protective order and a remedy under 42 U.S.C. § 1983. Section 1983 jurisdiction does not supplant the states, but "interpose[s] the federal courts . . . to protect the people from unconstitutional action under color of state law," *Mitchum v. Foster*, 407 U.S. 225, 242 (1972), and to provide a balanced means of "at least indirect federal control over the unconstitutional actions of state officials." *Ngiraingas v. Sanchez*, 495 U.S. 182, 189 (1990) (citing *District of Columbia v. Carter*, 409 U.S. 418, 428 (1973)). Thus, considering the ICCPR in these circumstances not only supports a remedy for Ms. Gonzales, but also encourages future enforcement of protective orders on the local level consistent with our international commitment. Just as federal courts adjudicate section 1983 claims against local officials and entities when they fail to accord positive

---

[49] This breakdown of legal protection from domestic violence at the police level is not unique to Colorado or the United States. According to the World Health Organization, internationally, "[a]fter support services for victims, efforts to reform police practice are the next most common form of intervention against domestic violence . . . . when training alone proved largely ineffective in changing police behaviour, efforts shifted to seeking laws requiring mandatory arrest for domestic violence and policies that forced police officers to take a more active stand." *WHO World Report, supra*, at 105.

federal due process protections to those accused of taking life,[50] so it would be consistent to the task of preserving life, and precious family relationships, to do so here.

In sum, by recognizing federal civil rights jurisdiction to provide an effective remedy for the due process violation and resultant unspeakable violence suffered by Ms. Gonzales and her children, this Court will "give[] legal force" to this treaty and will also signal to the world that the United States takes seriously its treaty and international legal commitments.

[50] *See, e.g, Mayer v. City of Chicago*, 404 U.S. 189 (1991) (indigent access to appeal in quasi-criminal cases); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel).

CONCLUSION

For the foregoing reasons, as well as those stated in the brief for Respondents, the decision of the court below should be affirmed.

Respectfully submitted,

Jennifer K. Brown*
Maya Raghu
Legal Momentum
395 Hudson Street
New York, N.Y. 10014
(212) 925-6635

*Counsel of Record

Rhonda Copelon•
Andrew Fields
International Women's
Human Rights Law Clinic
City University of New
York
School of Law
65-21 Main Street
Flushing, N.Y. 11367
(718) 340-4163

February 9, 2005

• Counsel wish to acknowledge the contributions of the interns in the International Women's Human Rights Law Clinic to this brief.

NAMES AND STATEMENTS OF INTEREST

OF *AMICI CURIAE*

Organizations

The Allard K. Lowenstein International Human Rights Clinic (the "Clinic") is a Yale Law School program that gives students first-hand experience in human rights advocacy. The Clinic undertakes numerous litigation and research projects on behalf of human rights organizations and individual victims of human rights abuses. The Clinic's work is based on the human rights standards contained in international customary and conventional law, at the core of which is the prohibition against discrimination. Since the Clinic began more than ten years ago, its students have worked on a number of lawsuits and other projects designed to combat racial, gender, ethnic and other kinds of discrimination. In recent years, the Clinic has focused increasing attention on efforts to ensure respect for international human rights standards in the United States.

Amnesty International USA is the U.S. section of Amnesty International, a Nobel Prize-winning organization with more than 1.8 million members, supporters and subscribers in over 150 countries and territories throughout the world. Amnesty International's mission is to undertake research and action focused on preventing and ending grave abuses of the rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination, within the context of its work to promote all human rights. Amnesty International is privately funded and is independent of any political ideology or economic interest.

The Center for Constitutional Rights ("CCR") is a non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. CCR has successfully litigated many important international human rights cases since 1980, including *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and currently represents the plaintiffs in *Doe v. Unocal*, *Wiwa v. Royal Dutch Petroleum*, *Bowoto v. Chevron* and *Saleh v. Titan*.

Center for Women's Global Leadership ("Global Center"), a project of Douglass College, Rutgers University (New Brunswick) has developed and facilitated women's leadership for women's human rights and social justice worldwide since 1989. The Global Center has advocated the recognition of women's human rights, and, in particular, violence against women, in international, regional and national contexts and has played a major role at various United Nations meetings addressing human rights norms and intergovernmental and national implementation of commitments relating, *inter alia*, to states' obligations to prevent, punish and eliminate violence against women.

Federation International de Droits de L'Homme ("FIDH") is an international nongovernmental organization for the defense of the human rights enshrined in the Universal Declaration of Human Rights of 1948. Created in 1922, it has its central office in Paris, France and includes 89 national affiliates throughout the world, including in the United States of America. FIDH enjoys consultative status with the United Nations, UNESCO, the European Council and observer status with the African Commission of Human and Peoples' Rights. FIDH participates in the defense of human rights through,

inter alia, sponsoring human rights missions and through advancing rights in intergovernmental as well as national courts and tribunals.

Human Rights Advocates ("HRA") is a human rights organization based in Berkeley, California dedicated to promoting and protecting international human rights. HRA participates actively in the work of various United Nations human rights bodies and is a fully accredited Non-Governmental Organization before the United Nations. HRA seeks to advance the panoply of human rights issues, including the rights of the child and women's rights, among others, through the United Nations system, by participation in international conferences, and through participation in litigation and other activities in the United States.

International Women's Human Rights Law Clinic ("IWHR"), founded in 1992, is an educational project of the City University of New York School of Law dedicated to promoting the international human rights of women and to implementation internationally, regionally and in the United States. IWHR is recognized for its expertise in the gender dimensions of international human rights and international criminal law as well as in constitutional issues of domestic implementation of human rights.

Legal Momentum advances the rights of women and girls by using the power of the law and creating innovative public policy. Legal Momentum advocates in the courts, Congress and state legislatures, as well as with unions and private business, to improve the protection afforded victims of domestic violence, and is a leading authority on the rights of immigrant victims of such violence. As with its *amicus curiae* brief in the cases

Grutter v. Bollinger and *Gratz v. Bollinger*, Legal Momentum here seeks to provide the Court with relevant, persuasive authority from international and comparative law that is relevant to the constitutional issues at hand.

National Economic and Social Rights Initiative ("NESRI"), founded in 2003 and located in New York City, promotes a cultural and political commitment to a human rights vision for the United States that ensures dignity and access to the basic resources needed for human development and civic participation. NESRI develops expert materials on human rights issues and works to strengthen legal standards in applying human rights to the United States.

International Human Rights Scholars And Experts

Willliam J. Aceves, California Western School of Law

Deborah Anker, Harvard Immigration and Refugee Clinical Program, Harvard Law School

Kelly Dawn Askin, Yale Fellow and Fulbright New Century Scholar

Charlotte Bunch, Rutgers University-New Brunswick

Carolyn Patty Blum, Boalt Hall (emeritus), University of California (Berkeley)

Douglass W. Cassel, Center for International Human Rights, Northwestern University School of Law

Janie Chuang, Washington College of Law, American University

Roger Clark, Rutgers Law School-Camden

Rebecca J. Cook, Faculty of Law, University of Toronto

Radhika Coomaraswamy, United Nations Special Rapporteur on Violence Against Women (1994-2003), Colombo, Sri Lanka

Martha Davis, New England School of Law

Connie de la Vega, University of San Francisco School of Law

Alda Facio, Concertacion Inter-Americana de las Mujeres Activistas para Los Derechos Humanos, San Jose, Costa Rica

George E. Edwards, Program in International Human Rights Law, Indiana University School of Law

Stephanie Farrior, Pennsylvania State University, Dickinson School of Law

Sid Harring, City University of New York School of Law

Deena R. Hurwitz, International Human Rights Law Clinic, University of Virginia School of Law

Scott T. Johnson, Attorney at Law, Santa Monica, California

Jules Lobel, University of Pittsburgh Law School

Bert Lockwood, Urban Morgan Institute for Human Rights, University of Cincinnati

Beth Lyon, Villanova University School of Law

Dorean Marguerite Koenig, Thomas M. Cooley Law School

Smita Narula, Center for Human Rights and Global Justice, New York University School of Law

Sarah H. Paoletti, International Human Rights Clinic, Washington College of Law

Karen Parker, International Human Rights Attorney, San Francisco, CA

Jordan J. Paust, University of Houston Law Center

Sir Nigel Rodley, Chair, Human Rights Centre, University of Essex, Colchester, United Kingdom

Meg Satterthwaite, Center for Human Rights and Global Justice, New York University School of Law

Martin Scheinin, Abo Akademi University, Institute for Human Rights, Abo/Turku, Finland

Beth Stephens, Rutgers-Camden School of Law

Penny M. Venetis, Rutgers School of Law – Newark

Wendy Webster Williams, Georgetown University Law Center

Richard J. Wilson, Washington College of Law, American University

(5)

No. 04-278

Supreme Court, U.S.
FILED
DEC 23 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,
Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHRYN GONZALES, and LESLIE GONZALES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND NATIONAL LEAGUE OF CITIES, NATIONAL SHERIFFS' ASSOCIATION, AND COUNTY SHERIFFS OF COLORADO IN SUPPORT OF PETITIONER

BRAD D. BAILEY
Counsel of Record
Office of the City Attorney
2255 W. Berry Avenue
Littleton, CO 80165
(303) 795-3725

[Additional counsel listed on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

DAVID PARKHURST
NATIONAL LEAGUE OF CITIES
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20005
(202) 626-3033

LANI WILLIAMS
INTERNATIONAL MUNICIPAL LAWYERS
ASSOCIATION (IMLA)
1110 Vermont Avenue, NW
Suite 200
Washington, D.C. 20005
(202) 466-5424

KATHRYN L. SCHROEDER
5334 S. Prince Street
Littleton, CO 80166-0001
(303) 795-4639

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI*	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
I. THE DUE PROCESS CLAUSE IMPOSES NO DUTY TO PROVIDE POLICE PROTECTION TO THE HOLDER OF A RESTRAINING ORDER	4
II. STATES SHOULD BE ALLOWED TO ADDRESS SOCIAL ILLS WITHOUT INCURRING LIABILITY WHEN THE RESULTS ARE UNSATISFACTORY	5
A. Colorado's Attempt to Stem Domestic Violence	5
B. Due Process Rights Are Not Created by States' Attempts to Deal More Effectively With Crime	7
III. THE CONSEQUENCES OF FINDING A VIOLATION OF THE DUE PROCESS CLAUSE	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 7
Boddie v. Connecticut, 401 U.S. 371 (1971) 7
DeShaney v. Winnebago County, 489 U.S. 189 (1989) 4
Estate of Gilmore v. Buckley, 787 F.2d 714 (1st Cir. 1986) 9
Ex parte Robinson 19 Wall. 505 (1874) 6
Martinez v. California, 444 U.S. 277 (1980) 5
The Slaughter-House Cases 83 U.S. (16 Wall.) 36 (1873) 4
Tuffend Sam v. Dearborn County Board of Health, 385 F.3d 1124 (7th Cir. 2004) 9
Young v. United States, ex rel Vuitton et Phils S.A., 481 U.S. 787 (1987) 6

U.S. CODE

42 U.S.C. § 1983 ..... 3, 4
42 U.S.C. § 1988 (2004) 10

STATE STATUTES

Colo. Rev. Stat. § 13-14-104 *et seq.* 6
Colo Rev. Stat. § 18-6-803.5 6
1984 Colo. Sess. Laws 500 5
1988 Colo. Sess. Laws 731 5
1991 Colo. Sess. Laws 418 6
Conn. Gen Stat. Ann § 46B-15a (2004) (foreign only) 6
Del. Code. Ann. Tit. 10, § 1046 (2004) 6
Ky. Rev. Stat. Ann. § 403.760 (2004) 6
Me. Rev. Stat. Ann. Tit. 19-A, § 4012 (2004) 6
Md. Code. Ann., Cts. & Jud. Proc. § 3-1503.1 (2004) 6

TABLE OF AUTHORITIES—Continued

Page

Minn. Stat. Ann. § 518B.01 (West 2004) 6
Miss. Code Ann. § 99-3-7(2004) 6
Mo. Ann. Stat. § 455.085 (West 2004) 6
Nev. Rev. Stat. Ann. 33.070 (West 2004) 6
N.H. Rev. Stat. Ann. § 173-B:9 (2004) 6
N.M. Stat. Ann. § 40-13-6 (West 1978) 7
N.C. Gen. Stat. Ann. § 50B-4 (West 2004) 7
N.D. Cent. Code § 14-07.1-11 (2004) 7
Pa. Stat. Ann. tit 32, § 6113 (West 2004) 7
S. C. Code Ann. § 16-3-1800 (West 2004) 7
S.D. Codified Laws § 23A-3-2.1 (West 2004) 7
Tex. Crim. Proc. Code Ann. Art. 14.03 (West 2004) 7
Wash. Rev. Code Ann. §§ 26.50.110, 26.52.070 (West 2004) 7
Wis. Stat. Ann. § 813.12 (West 2004) 7

OTHER AUTHORITIES

Colo. R. Civ. P. 65 6
United States Attorney General's Task Force on Family Violence, *Final Report* (1984) 5

IN THE

Supreme Court of the United States

No. 04-278

TOWN OF CASTLE ROCK, COLORADO,
Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHRYN GONZALES, and LESLIE GONZALES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND NATIONAL LEAGUE OF CITIES, NATIONAL SHERIFFS' ASSOCIATION, AND COUNTY SHERIFFS OF COLORADO IN SUPPORT OF PETITIONER

INTEREST OF *AMICI* *

The International Municipal Lawyers Association ("IMLA") is a professional organization consisting of more than 1,400 member entities. Its membership includes cities and coun-

* Pursuant to 37.6, *amici curiae* disclose that no counsel for any party in this case authored this brief in whole or in part. No person or entity other than *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent for filing this brief are on file with the clerk.

ties, as represented by their chief legal officers, state municipal leagues, and individual attorneys who represent local government entities. IMLA has provided services and educational programs to local government attorneys since 1935.

The National League of Cities ("NLC") is the country's largest and oldest organization serving municipal government, with more than 1,600 direct member cities and 49 state municipal leagues that collectively represent more than 18,000 United States communities. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance, and to serve as a national resource and advocate for the municipal governments it represents.

The National Sheriffs' Association ("NSA") is a nonprofit professional organization consisting of more than 21,000 individual members and serves as the advocate for 3088 sheriff's offices. The membership of NSA is comprised of sheriffs throughout the United States, and the attorneys who advise and represent them. The County Sheriffs of Colorado ("CSOC") is a nonprofit, nonpartisan professional organization consisting of 64 elected Colorado Sheriffs and has an honorary membership of 6,968.

The senseless tragedy that precipitated the underlying legal questions disturbs and offends *amici* and their members. The grievous facts, however, must not overshadow the proper resolution of the important constitutional issues presented by the Town of Castle Rock's petition. *Amici*, as advocates for the interest of local governments and the communities that they serve, file this brief on behalf of their members nationwide.

SUMMARY OF THE ARGUMENT

Mrs. Gonzales' constitutional claim under 42 U.S.C. § 1983 depends on whether the Town of Castle Rock, through its police officers, deprived her of property without due process of law. The holding of the Tenth Circuit Court of Appeals in this case ignores the purpose of the due process clause in the 14th Amendment.

The purpose of the due process clause is to place limitations upon the power of the government to interfere with an individual's life, liberty, or property. Mrs. Gonzales seeks to use the due process clause to protect her from dangers posed by others, not dangers posed by the State.

The Colorado General Assembly mandated arrests in instances where probable cause indicated a violation of a protective order issued in a domestic relations case. The General Assembly wished to insure consequences for those who violate such orders. The General Assembly's purpose was to deter the violation of protective orders and to eliminate further acts of domestic violence.

The intent of the legislature was not to create a property interest in the enforcement of court orders. The Colorado statute was never intended to create a claim of entitlement to police protection. State legislatures need wide latitude in dealing with various social problems including domestic violence. If the Tenth Circuit's decision is upheld, states will lose that flexibility.

If the Court upholds the decision of the Tenth Circuit, potentially every criminal statute would grant the victims of crime a constitutionally protected property right to police protection. Such a holding would increase costs for local government that they cannot absorb.

To deal with the allocation of scarce resources, financial and otherwise, possessed by local governments, the federal courts may become responsible for the operation of counties

and municipalities through lawsuits. The courts will end up telling local government officials how to allocate their limited time and resources to solve the various problems that local governments must address. For these reasons, the *amici* support the Town of Castle Rock in urging this Court to reverse the decision of the Tenth Circuit Court of Appeals.

ARGUMENT

I. THE DUE PROCESS CLAUSE IMPOSES NO DUTY TO PROVIDE POLICE PROTECTION TO THE HOLDER OF A RESTRAINING ORDER

Mrs. Gonzales' constitutional claim under Section 1983 depends on whether the Town of Castle Rock, through its police officers, can be said to have disobeyed the constitutional command "nor shall any state deprive any person of life, liberty or property, without due process of law." U.S. Constitution Amendment XIV, Section 1. The Tenth Circuit held that the Colorado Statute, requiring mandatory arrest when probable cause exists to believe a court issued domestic relations restraining order has been violated, created a property right in favor of Mrs. Gonzales, which could not be denied without due process. By doing so, the court created a property right out of whole cloth, sidestepping this Court's holding in *DeShaney v. Winnebago County*, 489 U.S. 189 (1989).

The due process clause is "a restraint on the power of the states," *The Slaughter-House Cases* 83 U.S. (16 Wall) 36, 80 (1873). "It forbids the state itself to deprive individuals of life, liberty, or property without 'due process of law' but its language cannot fairly be extended to impose an affirmative obligation on the State to insure those interests do not come to harm through other means." *DeShaney* at 195.

Mrs. Gonzales seeks to use the due process clause to require government to act to relieve her from the dangers

posed by others in society. It was not the Town of Castle Rock or its police officers who murdered Rebecca, Catherine and Leslie Gonzales. It was their father, Simon Gonzales who committed these atrocious acts. Like the parolee responsible for the murder at issue in *Martinez v. California*, 444 U.S. 277 (1980), Simon Gonzales was in no sense an agent of the Town of Castle Rock when he murdered his three children.

II. STATES SHOULD BE ALLOWED TO ADDRESS SOCIAL ILLS WITHOUT INCURRING LIABILITY WHEN THE RESULTS ARE UNSATISFACTORY

Domestic violence is a crime, although it was not recognized as such by the police or state legislatures of many states until recently. *See* United States Attorney General's Task Force on Family Violence, *Final Report* 11, 23 (1984) (indicating that violence between strangers was classified as assault, while violence between family members was classified as a family squabble, not rising to the level of a real crime.) For instance "domestic violence" was not a separate crime in Colorado until January 1, 1989. 1988 Colo. Sess. Laws 731. Prior to the creation of this new crime, prosecutors charged defendants with assault, murder, manslaughter, harassment, and criminal mischief.

A. Colorado's Attempt to Stem Domestic Violence

In 1984, Colorado allowed victims to seek mandatory protection orders against persons who posed a threat to them. 1984 Colo. Sess. Laws 500. However, in the opinion of the Colorado General Assembly, the 1989 creation of the new crime of domestic violence, coupled with the availability of a mandatory protection order, was still insufficient to eradicate the problem of domestic violence. Therefore, in 1991, the General Assembly consolidated all protection orders under one statutory section and criminalized violations of protective

orders. *See* 1991 Colo. Sess. Laws. 418, codified at Colo. Rev. Stat. §§ 13-14-101 through 104 and 18-6-803.5 (2004). The mandatory arrest provision for the violation of protective orders was added by the Colorado General Assembly in 1994. 1994 Colo. Sess. Laws 2027.

As suggested above, prior to 1991, Mrs. Gonzales could have gone to court and gotten a restraining order issued under Colorado Rule of Civil Procedure 65 and Mr. Gonzales could have been punished by the issuing court for contempt had he violated the order. It is firmly established that "the power to punish for contempt is inherent in all courts." *Ex parte Robinson*, 19 Wall. 505, 510 (1874). The contempt power reaches both conduct before the court and that beyond the court's confines. *Young v. United States, ex rel Vuitton et Phils S.A.*, 481 U.S. 787, 798 (1987).

However, the crowded nature of state court dockets, and the difficulty of getting persons who violate court orders in front of a judge, motivated the Colorado General Assembly, in part, in its crusade against domestic violence to create an additional enforcement mechanism for violation of protection orders. Therefore, the General Assembly made it a crime to violate a restraining order entered in a domestic relations case, and added the additional deterrent of mandatory arrest upon probable cause.

Colorado is not alone in mandating the arrest of persons who violate protective orders. Some 19 states require an arrest when a police officer has probable cause to believe that such orders have been violated. *See* Conn. Gen Stat. Ann. § 46b-15a (2004) (foreign only); Del. Code. Ann. tit. 10, § 1046 (2004); Ky. Rev. Stat. Ann. § 403.760 (2004); Me. Rev. Stat. Ann. tit. 19-A, § 4012 (2004); Md. Code. Ann., Cts. & Jud. Proc. § 3-1503.1 (2004); Minn. Stat. Ann. § 518B.01 (West 2004); Miss. Code Ann. § 99-3-7 (2004); Mo. Ann. Stat. § 455.085 (West 2004); Nev. Rev. Stat. Ann. 33.070 (West 2004); N.H. Rev. Stat. Ann. § 173-B:9 (2004);

N.M. Stat. Ann. § 40-13-6 (West 1978); N.C. Gen. Stat. Ann. §50B-4 (West 2004); N.D. Cent. Code § 14-07.1-11 (2004); Pa. Stat. Ann. tit 32, § 6113 (West 2004); S. C. Code Ann. § 16-3-1800 (West 2004); S.D. Codified Laws § 23A-3-2.1 (West 2004); Tex. Crim. Proc. Code Ann. Art. 14.03 (West 2004); Wash. Rev. Code Ann. §§ 26.50.110, 26.52.070 (West 2004); Wis. Stat. Ann. § 813.12 (West 2004). Thus, the ramifications of the Court's decision will reach local governments throughout the United States.

B. Due Process Rights Are Not Created by States' Attempts to Deal More Effectively With Crime

To have a property interest in a government benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Mrs. Gonzales had a property right in access to the courts to obtain a restraining order to prevent her husband from committing acts of violence against her or their children. *See Boddie v. Connecticut*, 401 U.S. 371 (1971). Mrs. Gonzales and the court which issued the protective order in this case surely expected that her ex-husband would abide by the terms and conditions of the order. Mrs. Gonzales may also have hoped that if Mr. Gonzales was proven to have violated the order he would been punished by the courts.

However, neither of these expectations rise to the level of creating a property right under *Roth*. Even the addition of the directive to law enforcement officers to arrest violators of protective orders does not lead to the creation of a property right. Without the creation of a right, it is difficult to support the Tenth Circuit's decision that Mrs. Gonzales was owed any process.

III. THE CONSEQUENCES OF FINDING A VIOLATION OF THE DUE PROCESS CLAUSE

If criminalizing the conduct at issue here creates a constitutional right to protection, which cannot be displaced without a hearing, then every criminal statute grants to victims a constitutionally protected property right to protection from violations of those statutes. For instance, local governments would be liable when they receive information regarding a crime in progress, but fail to respond "adequately enough" to prevent the crime. Taken to its extreme, the Tenth Circuit opinion requires local governments wishing to insure the protection of beneficiaries of restraining orders to assign a law enforcement officer to act as a body guard 24 hours a day, seven days a week, 365 days a year.

Not only would violations of criminal statutes create local government liability, but other statutes which impose an affirmative obligation upon local government to do something would also create governmental liability. For example, child protection statutes and statutes that work to protect the public health would create property rights in citizens, the "deprivation" of which could not be accomplished without a hearing. The "deprivation" need not be the consequence of some nefarious decision by local government officials or employees, but could result simply from the fact that local governments are over-taxed in all respects and hard decisions need to be made regarding which services and actions take priority at any given time or in any given situation. In some cases, it may be that even in spite of the best efforts of the local government, a particular loss or harm cannot be prevented. Yet under the Tenth Circuit's rule, the government's best efforts are of no consequence—the government is liable. Holding local governments liable for failing to protect crime victims or for failing to immediately cure violations of court orders and the like creates an enormous liability on behalf of locall governments. That cost would be impossible for the

local governments to absorb. In an effort to cover these cost, local governments would divert limited public resources away from services and infrastructure needs and into higher insurance premiums, litigation judgments, and settlement agreement payouts.

The observations made by the First Circuit in a similar case are pertinent here:

> enormous economic consequences could follow from the reading of the Fourteenth Amendment that Plaintiff here urges. Firemen who have been alerted to the victim's peril but fail to take effective action, municipal ambulances which, when called, arrive late; and myriad other errors by State officials in providing protective services, could all be found to violate the Constitution. It would seem appropriate that the citizenry, acting through state legislatures and state courts, should determine how far it wishes to go in reimbursing claims of this type.

Estate of Gilmore v. Buckley, 787 F.2d 714, 722-723 (1st Cir. 1986). Under the Tenth Circuit's holding, any local government act which is mandated by a state statute but not performed by the government would constitute a federal constitutional violation unless a pre-deprivation hearing was held. This simply cannot be accurate. If it is accurate, the federal courts will shortly be required to become involved in almost every aspect of the provision of local government services. The federal courts would become responsible for telling local government how to allocate their limited time and resources among the various law enforcement and other problems clamoring for their attention. *See Tuffend Sam v. Dearborn County Board of Health*, 385 F.3d 1124 (7th Cir. 2004).

Additionally, the federal courts would see their dockets swell because there would be no reason and no incentive for citizens who believe that their rights have been violated

through the inaction of local government to use the state courts to press a tort claim for redress of their grievance. The federal constitutional violation, coupled with the availability of attorneys fees under 42 U.S.C. § 1988 (2004) make the federal courts a much more attractive forum to vindicate potential plaintiffs' rights.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

BRAD D. BAILEY
Counsel of Record
Office of the City Attorney
2255 W. Berry Avenue
Littleton, CO 80165
(303) 795-3725

DAVID PARKHURST
NATIONAL LEAGUE OF CITIES
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20005
(202) 626-3033

LANI WILLIAMS
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION (IMLA)
1110 Vermont Avenue, NW
Suite 200
Washington, D.C. 20005
(202) 466-5424

KATHRYN L. SCHROEDER
5334 S. Prince Street
Littleton, CO 80166-0001
(303) 795-4639

Supreme Court, U.S.
FILED
FEB 10 2005
OFFICE OF THE CLERK

No. 04-278

IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHERYN GONZALES, and LESLIE GONZALES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PEGGY KERNS, FORMER MEMBER OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF COLORADO, AND TEXAS DOMESTIC VIOLENCE DIRECT SERVICE PROVIDERS, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

JAMES C. HARRINGTON
SHERI JOY NASYA TOLLIVER
TEXAS CIVIL RIGHTS PROJECT
1405 Montopolis Drive
Austin, TX 78741
(512) 474-5073

Counsel for Peggy Kerns

DAVID G. HALL*
ANDREA BELENO
JULIE M. BALOVICH
CHRISTINA TREJO
TEXAS RIOGRANDE LEGAL AID, INC.
300 S. Texas Boulevard
Weslaco, TX 78596
(956) 968-6574

Counsel for Texas Direct Service Providers

* *Counsel of Record*

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES iii

INTERESTS OF THE *AMICI CURIAE*..... 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE COURT OF APPEALS PROPERLY RECOGNIZED THAT COLORADO LAW CREATES A PROTECTED PROPERTY INTEREST IN MANDATORY POLICE ENFORCEMENT OF PROTECTION ORDERS..... 5

A. The Colorado Legislature Made a Conscious Choice of Policy to Require Mandatory Enforcement When Protection Orders are Issued..... 7

1. *The plain language of the statute requires mandatory enforcement.* 7

2. *The context of the statute reveals an overall purpose of toughening enforcement measures*..... 9

3. *Mandatory enforcement reflects the legislature's policy choice that the costs of domestic violence outweigh the burden of mandatory enforcement*..... 12

Contents

Page

B. The Colorado Legislature Gave the Judiciary Exclusive Discretion to Determine Whether a Person is Entitled to a Protection Order..... 15

II. ELEVATING THE AUTHORITY OF THE EXECUTIVE BRANCH TO OVERRULE DECISIONS MADE BY THE LEGISLATURE AND THE JUDICIARY WOULD WREAK HAVOC ON COLORADO'S SEPARATION OF POWERS DOCTRINE..... 18

III. THE CONSEQUENCES OF THE BREAKDOWN OF THE SEPARATION OF POWERS IN COLORADO ARE THE DANGERS THAT INSPIRED THE MANDATORY ENFORCEMENT STATUTE..... 20

IV. CONCLUSION..... 22

TABLE OF CITED AUTHORITIES

Page

CASES

Adams v. Richardson,
156 U.S. App. D.C. 267 (1973) (en banc) 11

Baltimore Gas and Electric Co. v. Federal Energy Regulatory Comm'n,
252 F.3d 456 (Ct. App. D.C. 2001) 11

Board of Regents v. Roth,
408 U.S. 564 (1972) 2, 3, 5, 17

Colo. Office of Consumer Counsel v. PUC,
42 P.3d 23 (Colo. 2002) 6

Colorado v. Pena,
911 P.2d 48 (Colo. 1996) 18

Daniels v. Williams,
474 U.S. 327 (1986) 20

Dreyer v. Illinois,
187 U.S. 71 (1902) 6

Gonzalez v. City of Castle Rock,
366 F.3d 1093 (10th Ct. App. 2004) (*en banc*) 3, 5, 15, 17

Heckler v. Chaney,
470 U.S. 821 (1985) 11

Cited Authorities

In re 2000-2001 Dist. Grand Jury in & for the First Judicial Dist.,
22 P.3d 922 (Colo. 2001) 6

In re Interrogatories Propounded by Senate Concerning House Bill 1078,
536 P.2d 308 (Colo. 2001) 6

Miller v. French,
530 U.S. 327 (2000) 6

National Advertising Co. v. Dep't of Highways,
751 P.2d 632 (Colo. 1988) 12

Paul v. Davis,
424 U.S. 693 (1976) 20

People v. Bagby,
734 P.2d 741 (Colo. 1987) 6

People v. Barth,
981 P.2d 1102 (Colo. App. 1999) 6

People v. Fuller,
788 P.2d 741 (Colo. 1990) 16

People v. Gallegos,
644 P.2d 920 (Colo. 1982) 6

People v. Gaskins,
825 P.2d 30 (Colo. 1992) 15

Cited Authorities

People v. Newman,
91 P.3d 369 (Colo. 2004) 6

United States v. Watson,
423 U.S. 411 (1976) 16

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 18, 21

STATE CONSTITUTION

Colo. Const.
art. III 3, 5
art. IV, § 2 18

STATE STATUTES

Colo. Rev. Stat. (2004)
§ 13-14-102(1) 3, 7, 10, 11
§ 13-14-102(9) 16
§ 13-14-102(9)(a) 16
§ 16-4-103(2) 7, 10
§ 18-1-1001(5) 7, 10
§ 18-6-803.5 ..... 3, 7
§ 18-6-803.5(1.5)(a.5)(I) 2
§ 18-6-803.5(2)(a) 7, 10
§ 18-6-803.5(2)(a.5) 7, 10
§ 18-6-803.5(3) 17
§ 18-6-803.5(3)(a) 8, 9
§ 18-6-803.5(3)(b) 3, 7, 8

§ 18-6-803.5(3)(c) 8
§ 18-6-803.5(5) 9
§ 18-6-803.5(6)(a) 8

Colo. R. Evid. 102 16

Other Authorities

Kathryn Anderson Clark et al., *A Cost-Benefit Analysis of the Violence Against Women Act*, 8 VIOLENCE AGAINST WOMEN 417 (2002) 12

COLORADO COALITION AGAINST DOMESTIC VIOLENCE, *Press Release: Program Shelters Continue to Reach Maximum Capacity Despite Community Support* (Apr. 12, 2004) 13, 14

Costs of Intimate Partner Violence Against Women in the United States, DEP'T OF HEALTH AND HUMAN SERVS., CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC) - NAT'L CTR. FOR INJURY PREVENTION & CONTROL, 19 (March 2003) 13

Melody Fuller & Janet Stansberry, "1984 Legislature Strengthens Domestic Violence Protective Orders," 23 COLO. LAW. 2327 (1994) 7

Hearing on H.B. 1253 Before the House Judiciary Comm., 1994 Leg. (Colo. 1994) 10

Wendy Max et al., *The Economic Toll of Intimate Partner Violence Against Women in the United States*, 19 VIOLENCE & VICTIMS 265 (June 2004) 13, 14

Ted R. Miller et al., *Victim Costs and Consequences: A New Look*, U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE No. 155282 (1996) 14

Connie Platt, *Domestic Violence: Impact on the Workplace*, NCADV VOICE (Summer 1993) 13

Elizabeth Topliffe, Note: *Why Civil Protection Orders are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not*, 67 IND. L.J. 1039 (1992) 19, 21

Deborah M. Weissman, *Gender-Based Violence as Judicial Anomoly: Between "The Truly National and the Truly Local,"* 42 B.C. L. REV. 1081 (September 2001). 21

Joan Zorza, *Women Battering: A Major Cause of Homelessness*, 25 CLEARINGHOUSE REV. 421 (1991) 13

Joan Zorza, *Women Battering: High Costs and the State of the Law*, 28 CLEARINGHOUSE REV. 383 (1994) .. 13

INTERESTS OF THE *AMICI CURIAE*[1]

Peggy Kerns is the director of the National Conference of State Legislators Center for Ethics in Government in Denver, Colorado. From 1989 to 1997, Ms. Kerns served in the Colorado House of Representatives, and in 1994, she served as the House minority leader. During her tenure as a Colorado legislator, Ms. Kerns had particular interest in criminal justice and social services issues and received a number of "best legislator" awards for her work in those areas. Ms. Kerns was the sponsor of House Bill 1253, which became the Colorado statute at issue in this case.

Texas RioGrande Legal Aid, Inc. ("TRLA"), a non-profit law firm that provides legal services to indigent residents in 68 counties of Southwest Texas, represents 19 domestic violence shelter organizations in its Texas service area. The Amistad Family Violence and Rape Crisis Center, Atascosa Family Crisis Center, Inc., Crisis Center of Comal County, Friendship of Women, Inc., Guadalupe Valley Family Violence Shelter, Highland Lakes Family Crisis Center, Hill Country Crisis Council, Family Crisis Center of Bastrop, Family Crisis Center of Harlingen, Family Crisis Center of the Big Bend, Family Violence Prevention Services, Inc. (San Antonio), Hays-Caldwell Women's Center, Winter Garden Women's Shelter, Inc., Mujeres Unidas, Southwest Family Life Center, Williamson County Crisis Center, SafePlace of Austin, the El Paso Center Against Family Violence, and Mid-Coast Family Services

---

[1] Pursuant to Rule 37.6, *amici curiae* disclose that no counsel for any party in this case authorized this brief in whole or in part. No person or entity other than *amici*, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief. Letters of consent for filing this brief are on file with the clerk.

are private, non-profit organizations that serve victims of domestic violence and sexual assault with safe shelter, counseling, and financial and legal advocacy.

TRLA and the Texas family violence shelters assist clients with obtaining criminally enforceable civil protective orders akin to the Colorado protection orders at issue in this case.[2] The Texas enforcement statute parallels Colorado's in that it mandates peace officers to make arrests for protection order violations under certain circumstances. As direct service providers, *amici* are keenly aware of the dangers of inconsistent law enforcement response to protection orders: clients become discouraged from reporting violations and the violations recur and escalate, sometimes with tragic consequences. A decision to reverse the Court of Appeals would adversely impact victims of domestic violence by rendering illusory the protection promised to them by the legislature and the courts.

SUMMARY OF ARGUMENT

This is a case about a state legislature's policy choice to create an entitlement to mandatory police enforcement of protection orders for victims of domestic violence, and a woman's right to due process for the deprivation of her entitlement. The first inquiry of this Court is whether Jessica Gonzales had a protected property interest. In *Board of Regents v. Roth*, 408 U.S. 564 (1972), this Court identified

---

[2] In 2003, the Colorado legislature nonsubstantively amended its domestic restraining order statute to use the term "protection order," clarifying that "protection orders" include any restraining order issued prior to 2003. *See* Colo. Rev. Stat. § 18-6-803.5(1.5)(a.5)(I) (2004). This brief will use the term "protection order" when referring to the order obtained by Jessica Gonzales.

the defining characteristics of constitutionally protected property interests: a benefit, defined by state rules or law, given to a person and on which the person may reasonably rely. *Id.* at 577. The Tenth Circuit decision correctly applied *Roth* in determining that under the Colorado statutory scheme, Jessica Gonzales became entitled to police enforcement of her protection order when the state court judge issued its order for her protection. 366 F.3d 1093, 1103 (10th Cir. App. 2004) (*en banc*). In doing so, the Court of Appeals gave proper deference to Colorado's separation of powers doctrine. Colo. Const. art. III. More than a rhetorical nicety, the state's separation of powers doctrine is intended to prevent exactly what occurred in this case: the arbitrary and dangerous exercise of power by one branch of government, usurping the power of another branch.

Pursuant to its constitutional authority, the Colorado legislature enacted a statute that provided substantive limitations on the discretion of police to enforce protection orders. Colo. Rev. Stat. § 18-6-803.5. Specifically tailored to resolve the problem of inconsistent police response to protection order calls, the statute reflects a policy choice that the reduction of family violence through consistent enforcement of protection orders is a high priority to the people of Colorado. *See id.* § 13-4-102(1). The language of the statute plainly states that police shall arrest or seek an arrest warrant when they find probable cause of a violation of a protection order. *Id.* § 18-6-803.5(3)(b). The structure and history of the statute evince the intent of the legislature to ensure that police consistently enforce protection orders issued by Colorado courts.

Once a trial court heard evidence and made a specific finding that Jessica Gonzales's husband was likely to harm

his wife and children, the court issued a protection order. At that point, Ms. Gonzales became entitled to mandatory police enforcement of her order. By refusing to enforce the order obtained by Jessica Gonzales, the Castle Rock police exceeded their statutory authority.

Reversing the court of appeals would upset Colorado's separation of powers in three ways: by endorsing police abdication of their duty to faithfully execute the laws; by ignoring the studied policy choices of the legislature; and by rejecting the particularized findings of a trial court. The policy choice to limit police discretion reflects the General Assembly's understanding of the unique dynamics of power and control in domestic disputes and the danger posed to victims by the escalating incidents of violence perpetrated by their batterers. As the facts of this case demonstrate, the determination that mandatory enforcement is necessary is one that is dangerous to permit police to second-guess. Unless peace officers are held accountable for refusing to follow the mandate of the legislature and the express order of the court, protection orders are meaningless. Respondents will be free to violate them in ways that seem harmless to a peace officer unfamiliar with the facts that led to the issuance of the order, and the danger to the victims of family violence will exponentially increase. While there may be exposure to liability in some cases for municipalities and agencies, such costs can be avoided by adopting policies of consistent enforcement in conformity with the General Assembly's mandate. Moreover, the costs of violating the Constitution should not be shifted to victims of domestic violence and to the taxpayers who shoulder the societal costs of domestic violence.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY RECOGNIZED THAT COLORADO LAW CREATES A PROTECTED PROPERTY INTEREST IN MANDATORY POLICE ENFORCEMENT OF PROTECTION ORDERS.

Board of Regents v. Roth, 408 U.S. 564 (1972), recognizes that due process protections apply to property interests that are "legitimate claim[s] of entitlement," the purpose being to protect "those claims upon which people rely in their daily lives." *Id.* at 577. The Court observed that property interests are created and their dimensions "defined by existing rules or understandings that stem from an independent source *such as state law*." *Id.* (emphasis added). Applying these guidelines and relevant precedent in what it recognized was a novel context, the Tenth Circuit Court of Appeals analyzed the Colorado protection order and the statute that authorized it and held that, together, they created a benefit in mandatory police enforcement to which Jessica Gonzales had a legitimate claim of entitlement. 366 F.3d 1093, 1100-01 (10th Ct. App. 2004) (*en banc*).

The Tenth Circuit's opinion underscores the authority of the Colorado legislative body – the General Assembly – to enact statutes that limit executive discretion pursuant to the state's constitutional separation of powers doctrine. *See* Colo. Const. art. III.[3] A foundational doctrine of both the federal and Colorado government, the separation of powers

---

[3] "The powers of the government of this state are divided into three distinct departments – the legislative, executive, and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted." Colo. Const. art. III.

doctrine prevents the encroachment of any one branch of government upon the power of another. *See Miller v. French*, 530 U.S. 327, 341 (2000); *People v. Barth*, 981 P.2d 1102, 1105 (Colo. App. 1999). Because the doctrine is not binding on the states by the federal government, it is necessary to look to Colorado law to determine whether the state applies its doctrine rigidly, or permits overlap of powers with respect to some matters. *See Dreyer v. Illinois*, 187 U.S. 71, 84 (1902); *In re Interrogatories Propounded by Senate Concerning House Bill 1078*, 536 P.2d 308, 316-17 (Colo. 1975).

Recognizing the General Assembly's critical role as the policy-making branch of government for the state, the Colorado Supreme Court has frequently acknowledged the General Assembly's power to curtail judicial and executive discretion to further public policy of the state. *See, e.g., People v. Newman,* 91 P.3d 369, 372 (Colo. 2004) (power to limit court's sentencing discretion); *Colo. Office of Consumer Counsel v. PUC*, 42 P.3d 23, 26 (Colo. 2002) (power to limit public utilities rate-making authority); *In re 2000-2001 Dist. Grand Jury in & for the First Judicial Dist.*, 22 P.3d 922, 926 (Colo. 2001) (power to limit court's authority to release a grand jury report); *People v. Bagby*, 734 P.2d 1059, 1061-62 (Colo. 1987) (power to limit prosecutorial discretion on what charges may be filed for violation of a specific statute). Accordingly, although the executive branch traditionally maintains discretion in enforcement decisions, *see People v. Gallegos,* 644 P.2d 920, 930-31 (Colo. 1982), the General Assembly is fully empowered to limit that discretion when public policy concerns dictate.

A. THE COLORADO LEGISLATURE MADE A CONSCIOUS CHOICE OF POLICY TO REQUIRE MANDATORY ENFORCEMENT WHEN PROTECTION ORDERS ARE ISSUED.

In 1994, the Colorado General Assembly tackled the problem of domestic violence through legislative reform. *See generally*, Melody Fuller & Janet Stansberry, "1994 Legislature Strengthens Domestic Violence Protective Orders," 23 COLO. LAW. 2327 (1994). The Assembly considered and passed HB 1253, the legislation that became Colo. Rev. Stat. § 18-6-803.5, by instituting a mandatory arrest policy for the violators of domestic violence protection orders. Colo. Rev. Stat. § 18-6-803.5(3)(b). Mandatory arrest was just one provision in an omnibus bill intended to strengthen the protections and remedies available to domestic violence victims. The bill included a finding of the necessity of a consistent statewide law enforcement response to domestic violence, *id.* § 13-14-102(1), and toughened civil and criminal penalties to hold the perpetrators of family violence accountable for their actions and deter them from committing future acts of violence. *Id.* §§ 16-4-103(2); 18-6-803.5(2)(a); 18-6-803.5(2)(a.5); 18-1-1001(5).

1. The plain language of the statute requires mandatory enforcement.

Petitioner and its *amici* argue that Colorado did not create an entitlement to mandatory enforcement, because the mandate to law enforcement in the statute is "conditional" or "discretionary." Petitioner's Brief, at 26; Brief of the United States of America, at 15. This distorted reading of the statute ignores the plain language of section 18-6-803.5, which expressly states in mandatory terms the obligations of police

officers when responding to protection order violation calls. The statute begins with the broad mandate to law enforcement that "[a] peace officer *shall* use every reasonable means to enforce a protection order." Colo. Rev. Stat. § 18-6-803.5(3)(a) (emphasis added). The statute goes on to specify exactly what minimum enforcement is required, and how it must proceed. Initially, a peace officer must determine whether probable cause exists to believe that (1) a valid protection order has been violated, and (2) the restrained person had notice of the order. *Id.* § 18-6-803.5(3)(b). The statute limits the peace officer's discretion in making a probable cause determination, by requiring her to assume that all information provided by the crime information registry is accurate, and by requiring her to accept a protection order as valid even if it does not appear in the registry. *Id.* § 18-6-803.5(3)(c).

Upon finding probable cause to believe that a valid protection order has been violated and that the restrained person had notice of the order, the statute mandates that "[a] peace officer shall arrest," or, if an arrest would be impractical, "seek a warrant for the arrest" of the offender. *Id.* § 18-6-803.5(3)(b). Despite the efforts of the Petitioner to torture any recognizable, plain, common-sense meaning out of the word "shall," the statute is plainly worded and both the English language and the context indicate that "shall" is intended to be a mandate. The statute uses "shall" when referring to actions that must take place (arrest, or seeking an arrest warrant), and uses "may" when referring to actions that are within the discretion of the peace officer (arrest without notice, transportation of the victim to a shelter). *Id.* § 18-6-803.5(6)(a).

Petitioner argues that the statute provides options for enforcement because it authorizes other "reasonable means" of enforcing the order. Petitioner's Brief, at 29. However, the statute's complementary enforcement options should not be read to undermine the mandatory enforcement provisions. The peace officer is obligated to arrest unless impractical; e.g., when the person who violated the order is not to be found at the scene. In that case, the General Assembly requires the peace officer to seek an arrest warrant. The provision that the officer "shall use every reasonable means" simply empowers law enforcement to use supplemental means to enforce the order. Colo. Rev. Stat. § 18-803.5(3)(a). There is no logical reading of the statute that authorizes peace officers to do *nothing*, which is exactly what Ms. Gonzales alleges the Castle Rock police did in this case.

2. The context of the statute reveals an overall purpose of toughening enforcement measures.

The rest of the statute signals the General Assembly's intent to require vigorous enforcement of the protection orders. In the same section that dictates that peace officers "shall" enforce protection orders, the General Assembly shields peace officers from liability stemming from erroneous arrests made in the course of enforcing protection orders. Colo. Rev. Stat. § 18-6-803.5(5). The exemption of liability for peace officers under those circumstances reveals that the General Assembly, as a policy choice, preferred the risk of erroneous arrest to the risk presented by permitting the police discretion not to arrest. These policy choices by the General Assembly clearly reflect the stated intent that the enforcement of protection orders are of paramount importance.

Moreover, the statute creates enhanced criminal penalties for domestic violence offenders. Colo. Rev. Stat. §§ 16-4-103(2); 18-1-1001(5). In fact, the General Assembly enhanced the penalties for subsequent violations of protection orders. *Id.* § 18-6-803.5(2)(a). In recognition of the unique danger that domestic violence offenders pose to their victims, the General Assembly designated a second violation of a protection order a crime of "extraordinary risk," subject to a higher sentencing range. *Id.* § 18-6-803.5(2)(a.5). The toughening of criminal penalties mirrors the toughening of enforcement mechanisms.

Significantly, the General Assembly codified its finding that uniform procedures were a necessary response to the dangers posed by unchecked domestic violence: "The general assembly hereby finds that *the issuance and enforcement of protection orders are of paramount importance* in the state of Colorado because protection orders promote safety, reduce violence, and prevent serious harm and death." Colo. Rev. Stat. § 13-14-102(1) (emphasis added). Further, the sponsor of the bill in the House of Representatives spoke of the need for consistent action by the criminal justice system to fight domestic violence: "[T]he entire criminal justice system must act in a consistent manner, *which does not now occur*. The police *must* make probable cause arrests." *Hearing on H.B. 1253 Before the House Judiciary Comm.*, 1994 Leg. (Colo. 1994) (statement of Rep. Kerns, sponsor) (emphasis added).

Petitioner through its *amicus* argues that Colorado law did not create a property interest based on the traditional understanding that executive enforcement decisions involving third parties are not subject to review. Brief for the United States of America, at 17-18. But the traditional

presumption that executive discretion *not* to take an enforcement action is unreviewable is "only a presumption, not a categorical rule." *Baltimore Gas and Electric Co. v. Federal Energy Regulatory Commission,* 252 F.3d 456, 460 (Ct. App. D.C. 2001). In *Heckler v. Chaney*, the Court recognized that the presumption may be overcome where a substantive statute – as there is in this case -- provides guidelines for the agency to follow in its enforcement powers. 470 U.S. 821, 832-33 & n. 4 (1985).[4]

Petitioner argues that the statute must be read in the context of the normal discretion afforded law enforcement officers in enforcement matters. Brief of Petitioner, at 30. We agree: the plain language and history of the statute demonstrate that the General Assembly recognized traditional police discretion and specifically rejected its applicability to protection order violations. Far from undermining the mandatory nature of this statute, the fact that Colorado law traditionally affords local police discretion in enforcement reinforces the conclusion that the General Assembly purposefully delimited that discretion for protection order enforcement. The protection order statute begins with the codified finding that protection order enforcement is a matter of "paramount importance in the state of Colorado." Colo. Rev. Stat. § 13-14-102(1). Deference must be afforded to statements by the General Assembly that a public policy matter is of state-wide

[4] In *Chaney*, the Court also recognized that an enforcement decision may be reviewed in cases where it could be found that the agency "'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." 470 U.S. at 833 n. 4 (citing *Adams v. Richardson*, 156 U.S. App. D.C. 267 (1973) (en banc)). This case arguably implicates this exception as well, given that Ms. Gonzales alleged in her complaint that the Town of Castle Rock maintained a policy of failing to respond to complaints of domestic restraining order violations and tolerated the non-enforcement of such orders.

concern. *See National Advertising Co. v. Dep't of Highways*, 751 P.2d 632, 635 (Colo. 1988).[5]

3. *Mandatory enforcement reflects the legislature's policy choice that the costs of domestic violence outweigh the burden of mandatory enforcement.*

While limiting police discretion may appear to be a drastic remedy, in fact, for states, the costs of not confronting domestic violence in a forceful manner far outweigh the costs of potential liability for failure to enforce protection orders. The data show that strong enforcement of measures meant to prevent family violence saves society substantial costs. *See* Kathryn Anderson Clark et al., *A Cost-Benefit Analysis of the Violence Against Women Act*, 8 VIOLENCE AGAINST WOMEN 417, 418 (2002) (finding that the prevention and enforcement measures of the Violence Against Women Act of 1994 have reduced the societal costs associated with violent criminal victimization of women).

The economic toll of domestic violence is devastating to society because its impact hits on a number of levels, including medical and mental health care, social services, the workplace, and the criminal justice system. In the employment sector, victims of domestic violence lose a total of nearly eight million days of paid work annually, the

---

[5] *Amicus* United States of America argues that the existence of other statutes which provide for mandatory suppression of riots and mandatory arrest of fugitives prove that Colorado did not intend an inflexible duty to arrest. Brief of the United States of America, at 16. But those statutes differ in this important respect: their enforcement provisions are not triggered by specific orders issued on behalf of a specific person and to a specific person. Thus, even if the statutes use mandatory language, it does not follow that they create a protected property interest.

equivalent of 32,114 full-time jobs each year. *Costs of Intimate Partner Violence Against Women in the United States*, DEP'T OF HEALTH AND HUMAN SERVS., CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC) -- NAT'L CTR. FOR INJURY PREVENTION & CONTROL, 19 (March 2003). Employers in this country spend at least $3 billion each year in lost work time, increased health care costs, higher turnover, and lower productivity due to domestic violence. Connie Platt, *Domestic Violence: Impact on the Workplace*, NCADV VOICE, Summer 1993, at 16. In the health-care sector, the estimated annual cost of health care due to domestic violence in this country is $4.1 billion. NAT'L CTR. FOR INJURY PREVENTION & CONTROL, *supra* at 30. More than 1,400,000 visits to American emergency rooms per year result from domestic violence. Joan Zorza, *Women Battering: High Costs and the State of the Law*, 28 CLEARINGHOUSE REV. 383, 383 (1994). These costs are significant not only for individual victims, but for the public as a whole. An analysis of the costs of medical care associated with domestic violence physical assaults found that Medicare and Medicaid shouldered 20% of those costs. Wendy Max, et al., *The Economic Toll of Intimate Partner Violence Against Women in the United States*, 19 VIOLENCE & VICTIMS 265, 266 (June 2004). In the housing sector, an estimated 50% of all homeless women and children in the United States are fleeing domestic violence, resulting in millions of dollars spent by states to maintain shelters. Joan Zorza, *Women Battering: A Major Cause of Homelessness*, 25 CLEARINGHOUSE REV. 421, 421 (1991). In Colorado alone, domestic violence advocacy programs provided 101,517 nights of shelter, while still having to turn away more than 10,000 women and children. COLORADO COALITION AGAINST DOMESTIC VIOLENCE, *Press Release:*

Program Shelters Continue to Reach Maximum Capacity Despite Community Support (Apr. 12, 2004).

All told, the estimated cost of medical care, mental health services, and lost productivity from injury and premature death due to domestic violence against adult women totaled more than $8.3 billion in the United States in 2003. Max, et al., *supra* at 259. This figure does not include lost quality of life valuations or the costs states must pay to maintain shelters, the criminal justice system, and services for children in homes where domestic violence takes place (including foster care and counseling programs). A study that included expenses resulting from lost quality of life estimated the total costs of domestic violence in the United States to be $67 billion in 1993. Ted R. Miller, et al., *Victim Costs and Consequences: A New Look* (U.S. Dep't of Justice, Nat'l Inst. of Justice No. 155282, 1996).

The staggering economic, societal, and human cost of domestic violence was part of the impetus that led the Colorado General Assembly to find that effectively combating domestic violence is of paramount importance. These policy decisions are the appropriate province for the legislative branch, which has the resources and the constitutional authority to hold hearings and conduct investigations for the purpose of determining the best legislative policy for the State of Colorado. The General Assembly concluded that mandatory enforcement of protection orders was necessary to reduce domestic violence; the Assembly therefore made the mandatory enforcement of protection orders a public policy priority. In doing so, the Colorado legislature created a benefit to which domestic violence victims who receive protection orders have a legitimate claim of entitlement.

B. THE COLORADO LEGISLATURE GAVE THE JUDICIARY EXCLUSIVE DISCRETION TO DETERMINE WHETHER A PERSON IS ENTITLED TO A PROTECTION ORDER.

The Tenth Circuit concluded that the property interest in this case "derives from the existence of a restraining order issued by a court on behalf of a particular person and directed at specific individuals and police." 366 F.3d at 1104, n. 9. In other words, there is no entitlement to mandatory police enforcement until a court issues a protection order pursuant to this statute. Thus, a protected property interest arises here, where it does not in the context of other statutes that provide for mandatory enforcement, because there is a specific order issued on behalf of a specific person.

The Colorado legislature placed all of the discretion to determine whether a person is entitled to mandatory enforcement of a protection order in the judiciary. This grant of discretion is appropriate. Of the three branches of government, only the judiciary is uniquely situated to determine whether there is the likelihood of future violence such that a protection order is warranted in a specific case.

As a general rule, trial courts are in the business of evaluating the credibility of witnesses and the weight and force of evidence. *See People v. Gaskins*, 825 P.2d 30, 38 (Colo. 1992) (observing that factual inquiries are appropriate for trial courts and not reviewing courts). Unlike peace officers, who must often make split-second decisions based on whatever limited, unverified and often unverifiable information they have when they appear on a scene, courts have the opportunity to develop a record through an adversarial system that gives full notice to be heard to both

parties. *See* Colo. Rev. Stat. § 13-14-102(9) (providing that the judge's determination of case shall occur after the citation to defendant is returned and a hearing has been had). Furthermore, courts have the benefit of a system of rules of evidence and civil procedure designed to ensure that only reliable evidence is evaluated when making findings. *See* Colo. R. Evid. 102 (stating that the rules of evidence should be construed to ensure that "the truth may be ascertained and proceedings justly determined"); *People v. Fuller*, 788 P.2d 741, 746 (Colo. 1990) (assessing the admission of evidence as meeting the purpose of the rules of evidence because it was reliable and would lead to a finding of the truth). Additionally, courts are deemed to be neutral arbiters of evidence, safeguarding the rights of both the applicant and respondent and insuring that the determination of whether a protection order is needed will not be made in a partisan or arbitrary matter. *Cf. United States v. Watson*, 423 U.S. 411, 447-48 & n.12 (1976) (explaining the purpose of the warrant requirement in the Fourth Amendment to the United States Constitution).

Under the Colorado legislative scheme, the benefit of mandatory police enforcement only becomes a protected property interest when a court makes two essential findings: (1) that the defendant committed acts giving grounds for issuing the order; and (2) that there is a likelihood that the defendant will commit such acts in the future unless restrained. Col. Rev. Stat. § 13-14-102(9)(a). Once a court makes those two critical findings, the legislature requires the court to order a permanent protection order benefiting the victim. Thus, when a court has made these findings, the court's discretion ends. The court is obligated to issue the order upon making the above findings. *Id.* A protection order properly issued pursuant to section 13-14-102(9)

carries with it the promise and benefit of mandatory enforcement. *Id.* § 18-6-803.5(3).

A beneficiary of a protection order is entitled to rely on the promise of mandatory enforcement not simply because there is a statute, but because of the court's individualized fact-finding process which concluded that the statute must be applied in her case. Only at that point does the potential benefit of the statute become actualized; the court makes the requisite findings and further admonishes the batterer as to the mandatory arrest provisions in the law. *Id.* The beneficiary of the order leaves the courtroom with the protection order and the promise that the state will enforce this order -- a legitimate claim of entitlement to a government benefit that she relies on in her daily life.

In this case, the trial court reviewed the evidence in an adversarial hearing at which Mr. Gonzales had an opportunity to be heard. The court found that physical or emotional harm would result if Mr. Gonzales were not excluded from the home, ordered to stay at least 100 yards away from the property at all times, and restricted in his access to the children. *See* 366 F.3d at 1103. The court incorporated the mandatory enforcement provisions of the enabling statute, instructing the police regarding their mandatory duty to enforce the order, and thus creating a claim of entitlement to mandatory enforcement that Jessica Gonzales believed she could rely on. *See Roth, 408 U.S. at 577.*

II. ELEVATING THE AUTHORITY OF THE EXECUTIVE BRANCH TO OVERRULE DECISIONS MADE BY THE LEGISLATURE AND THE JUDICIARY WOULD WREAK HAVOC ON COLORADO'S SEPARATION OF POWERS DOCTRINE.

A decision to reverse the Tenth Circuit by refusing to recognize Jessica Gonzales's property right would upset the separation of powers in Colorado in three ways: (1) by sanctioning the executive branch's abdication of duty; (2) by ignoring the policy choices made by the Colorado legislature; and; (3) by rejecting the fact-findings made by the Colorado trial court.

Police refusal to enforce mandatory arrest laws violates the constitutional duty of the executive branch to faithfully execute the laws. *See Colorado v. Pena*, 911 P.2d 48, 55 (Colo. 1996); *see also* Colo. Const. art IV § 2. When the executive acts contrary to the legislature's express wishes, it is not a minor matter. As this Court stated in a seminal case involving the power of the executive branch: "It is to disrespect the whole legislative process and the constitutional division of authority between the [executive] and [legislature]." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952) (Frankfurter, Jr., concurring); *see also id.* at 637 (Jackson, J. concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . ")

Furthermore, when the police choose not to enforce mandatory arrest laws, they encroach upon the exclusive province of the legislative branch to make public policy for the state. Petitioner's *amicus* argues that police should have

the discretion to not arrest in the cases of non-violent restraining order violations. *See* Brief for the United States of America, at 25. But this assertion endorses the proposition that police should substitute their own policy judgments for those of the legislature, dismissing the fact that the General Assembly enacted the statute based on a studied understanding of the dynamics of domestic violence. When family violence has occurred, it is likely to recur and to escalate. The value of a protection order is that it potentially prevents violence *before* it can occur. If a peace officer refuses to arrest or to seek a warrant because he does not believe that the batterer is causing harm, a harm has occurred: the batterer has violated the protection order without consequence and may be emboldened to do so again. *See* Elizabeth Topliffe, Note: *Why Civil Protection Orders are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not,* 67 IND. L.J. 1039, 1046-47 (1992).

Moreover, peace officers are likely to misperceive the severity of a domestic abuse situation, as is tragically illustrated by this case. The *amicus* for Petitioner argue that being forced to enforce protection orders would require them to prioritize protection order violation calls over more severe and dangerous calls. *See* Brief for the United States of America, at 25. But a critical difference between protection order violation calls and other criminal situations is that the severity and dangerousness of the situation has already been adjudicated and resulted in the issuance of the protection order; the fact that the protection order is being violated is an indication of the batterer's dangerousness and disregard for the law. Thus, when a court has found a likelihood of future harm and issued a protection order pursuant to the statute,

peace officers should not be permitted to substitute their own assessments.

Federal respect for Colorado's choice as to how to regulate the complicated area of family violence means respecting the decision of the General Assembly to delimit police discretion and require mandatory enforcement. Petitioner suggests that federal deference to the enforcement regime means further respecting the fact that Colorado provides only a very limited tort remedy against police officers who fail to comply with mandatory enforcement. Petitioner's Brief, at 33. But this Court has long stated that due process remedies are not a "font of tort law." *Paul v. Davis*, 424 U.S. 693, 701 (1976); *see also Daniels v. Williams*, 474 U.S. 327, 333 (1986) ("It is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns.") Thus, recognizing a due process remedy in no way insults a state's authority in its decision whether to provide a tort law remedy. The two concepts are distinct. A due process right does not arise because a state creates a tort remedy; rather, a remedy for a violation of due process is necessary when a government creates an entitlement that requires due process protection

III. THE CONSEQUENCES OF THE BREAKDOWN OF THE SEPARATION OF POWERS IN COLORADO ARE THE DANGERS THAT INSPIRED THE MANDATORY ENFORCEMENT STATUTE.

"The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in

even the most disinterested assertion of authority." *Youngstown*, 343 U.S. at 594 (Frankfurter, J., concurring). The executive branch's choice to second-guess the policy choice of the legislature and the adjudication of the judiciary is a dangerous one. Left unchecked by the imposition of liability for its actions, the Castle Rock police may continue to exercise unauthorized discretion in determining whether to make arrests for violations of protection orders. This case illustrates the most tragic result of what can happen where peace officers make their own decision whether arrest is warranted and whether the protected persons face any "real" danger from the domestic violence perpetrator. But the impact is farther-reaching than the murder of the Gonzales children.

As the General Assembly found, protection orders can be an effective means of minimizing future family violence. In that they can stop violence from recurring in the future, protection orders are invaluable in encouraging victims to break out of the cycle of violence. Victims may be more willing to get a protection order than to press criminal charges, so as not to lose the source of financial support for their family. *See Topliffe* supra, at 1048. Because they are civil proceedings, there is a lower burden of proof to obtain a protection order than a criminal conviction, which is critical in these cases where often the sole witnesses to the crime are the victim and batterer. *Id.* Perhaps more importantly, obtaining a protection order empowers a victim to take a stand against her batterer, disrupting the dynamics of power and control the batterer has over the victim that is typical of abusive relationships. *See* Deborah M. Weissman, *Gender-Based Violence as Judicial Anomoly: Between "The Truly National and the Truly Local,"* 42 B.C. L. REV. 1081, 1138 & n.317 (September 2001).

In arguing that the Court of Appeals opinion should be reversed, the Petitioner's *amici* present a parade of horribles that they claim would result from recognition of Ms. Gonzales's constitutional claim: liability imposed for minor violations of state law, local government bodies falling into economic collapse from lawsuits. In reality, timely enforcement prevents many of the costs local governments face when domestic violence victims are not protected, especially the investigation and prosecution of homicides and sexual assaults. Further, the concern about liability creates an appropriate incentive for law enforcement agencies and municipalities to adopt policies of consistent and mandatory enforcement in accordance with the law. These minimum enforcement requirements do not pose an unreasonable burden on municipalities. The enforcement mechanisms that are mandated do not call for mandatory general police protection for all victims. They simply call for the arrest of the violator of a protection order, or that the police seek an arrest warrant for the offender. Because mandatory arrest is a policy choice of the legislature, it is the responsibility of the General Assembly -- the branch of government in the best position to assess public policy in the context of state's priorities, needs, and resources -- to change the law if it is not feasible or desirable.

IV. CONCLUSION

In Colorado, the separation of powers doctrine enables the General Assembly to limit executive discretion to further public policy. The plain language, history, and structure of the statute establish that the General Assembly intended for police to prioritize domestic violence cases on the highest level. When the judiciary made its particularized

findings in the Gonzales case, Jessica Gonzales became entitled to mandatory police protection. Recognizing the property interest in this case accords proper respect to the separation of powers in Colorado. If the demands of the statute are impossible as Petitioner claims, the police agencies have the mechanisms of the democratic process to revisit the policy decisions made by the General Assembly. The solution is not for them to substitute their judgment for the determinations already made by the legislature and the courts. Nor is the solution to pass the costs of violating the Constitution upon the individual whose rights were violated. The Court of Appeals en banc decision should be affirmed.

Respectfully submitted,

JAMES C. HARRINGTON
SHERI JOY NASYA TOLLIVER
TEXAS CIVIL RIGHTS PROJECT
1405 Montopolis Drive
Austin, TX 78741
(512) 474-5073
Counsel for Peggy Kerns

DAVID G. HALL
Counsel of record
ANDREA BELENO
JULIE M. BALOVICH
CHRISTINA TREJO
TEXAS RIOGRANDE LEGAL AID, INC.
300 S. Texas Blvd.
Weslaco, TX 78596
(956) 968-6574
Counsel for Texas Direct Service Providers[6]

---

[6] Meliah A. Thomas, a law student at the University of California, Berkeley,. provided research assistance on the brief.

FEB 10 2005
OFFICE OF THE CLERK

No. 04-278

IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,
Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHERYN GONZALES, AND LESLIE GONZALES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF WOMEN LAWYERS AND THE NATIONAL CRIME VICTIMS BAR ASSOCIATION IN SUPPORT OF RESPONDENT

LORELIE S. MASTERS *
DAVID FAGUNDES
LINDSAY C. HARRISON
JENNER & BLOCK LLP
601 13th Street, NW
Washington, DC 20005
(202) 639-6000

* Counsel of Record

February 10, 2005

Attorneys for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE AVAILABILITY OF A POST-DEPRIVATION STATE TORT REMEDY DOES NOT SATISFY THE REQUIREMENTS OF PROCEDURAL DUE PROCESS 4

II. STATE TORT SUITS ARE AN INADEQUATE REMEDY FOR DEPRIVATION OF THE ENTITLEMENT CREATED BY MANDATORY ARREST STATUTES 7

A. Tort Law's Focus on Compensation for the Harms of Violence Rather than on Pre-Deprivation Process Renders Its Remedies Structurally Inappropriate for the Type of Injury Suffered in This Case. 7

B. Doctrinal Hurdles Render Tort Suits Ineffective as a Remedy for Erroneous Deprivation of Enforcement of a Protection Order. 10

C. The Colorado General Assembly Recognized the Inadequacy of Its Tort Law in Establishing an Entitlement Under § 18-6-803.5(3)(b) Deserving of Pre-Deprivation Due Process. 13

III. THE INADEQUACY OF STATE REMEDIAL SCHEMES NECESSITATES A FEDERAL REMEDY. 16

A. Finding a § 1983 Claim Where State Tort Law Is Deficient Is Consistent with the Legislative Intent of § 1983 16

B. Federal Law Often Recognizes a Property Interest Even When State Tort Law Provides No Adequate Remedy for Deprivation of That Interest. 18

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Albright v. Oliver, 510 U.S. 266 (1994) 6

Baldwin v. Reese, 541 U.S. 27 (2004) 4

Bell v. Burson, 402 U.S. 535 (1971) 18

Bisbee v. Bey, 39 F.3d 1096 (10th Cir. 1994) 18

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 16, 18

Daniels v. Williams, 474 U.S. 327 (1986) 19

Fuentes v. Shevin, 407 U.S. 67 (1972) 7

Goldberg v. Kelly, 397 U.S. 254 (1970) 18

Hook v. Lakeside Park Co., 351 P.2d 261 (Colo. 1960) 12

Leake v. Cain, 720 P.2d 152 (Colo. 1986) 12

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 5, 11, 18

Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978) 18

Mitchum v. Foster, 407 U.S. 225 (1972) 17

Monroe v. Pape, 365 U.S. 167 (1961), *overruled by Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978) 4, 5, 17

Parratt v. Taylor, 451 U.S. 527 (1981) 5

Patsy v. Board of Regents of Florida, 457 U.S. 496 (1982) 17

Perry v. Sindermann, 408 U.S. 593 (1972) 18

Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41 (1987) 18

Potter v. Thieman, 770 P.2d 1348 (Colo. Ct. App. 1989) 12

Rohrbough v. Stone, 189 F. Supp. 2d 1088 (D. Colo. 2001) 11

Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981) 16

Ruegsegger v. Jefferson County Board of County Commissioners, 197 F. Supp. 2d 1247 (D. Colo. 2001) 11

Smith v. State Compensation Insurance Fund, 749 P.2d 462 (Colo. Ct. App. 1987) 12

United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) 15

Whitcomb v. City & County of Denver, 731 P.2d 749 (Colo. Ct. App. 1986) 12

Wilson v. Garcia, 471 U.S. 261 (1985) 4, 17

Zinermon v. Burch, 494 U.S. 113 (1990) 4, 6, 7, 11

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. art. VI, § 2 15

42 U.S.C. § 1983 ..... *passim*

Colo. Rev. Stat. § 18-6-803.5(3)(b) 13, 14, 15, 19

Colo. Rev. Stat. § 18-6-803.5 3

Colo. Rev. Stat. § 18-6-803.5(5) 14

Colo. Rev. Stat. § 24-10-101 *et seq.* 15

Colo. Rev. Stat. § 24-10-118(2) 11

LEGISLATIVE MATERIALS

Hearings on House Bill 1253 Before the House Comm. on the Judiciary (Colo. Feb. 15, 1994) 13

MISCELLANEOUS

Andrea Brenneke, *Civil Rights for Battered Women: Axiomatic and Ignored*, 11 Law & Ineq. 1 (1992) 8, 10

Erwin Chemerinsky, *Federal Jurisdiction* (3d ed. 1999) 17

Donna Coker, *Crime Control and Law Reform in Domestic Violence Law: A Critical Review*, 4 Buff. Crim. L. Rev. 801 (2001) 9

Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 Yale J. of L. & Feminism 3 (1999) 14

Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 Wm. & Mary L. Rev. 1843 (2002) 10

Julie Goldscheid, *Crime Victim Compensation in a Post-9/11 World*, 79 Tul. L. Rev. 167 (2004) 8

Jennifer Wriggins, *Domestic Violence Torts*, 75 S. Cal. L. Rev. 121 (2001) 8

INTERESTS OF *AMICI CURIAE*[1]

The National Association of Women Lawyers, headquartered in Chicago, is the oldest women's bar association in North America. Founded in 1899, the Association promotes the interests of women and families, as well as women in the legal profession.

The Association has filed as *amicus curiae* in the Supreme Court of the United States, as well as in the highest courts of many states. The Association has a strong interest in protecting the legal rights of women and girls and strongly supports the rights of women to seek recourse in the courts for protection from domestic violence and abuse. For that reason, the National Association of Women Lawyers files as *amicus curiae* in this matter to help promote access to justice for all women, particularly those who are victims of domestic violence and abuse.

The National Crime Victim Bar Association (NCVBA) is a specialty practice bar for attorneys who represent victims of crime in civil tort claims against both intentional tortfeasors and negligent third parties. The NCVBA is comprised of approximately 250 plaintiffs' attorneys in forty-three states and the District of Columbia. The organization publishes a quarterly law journal, Victim Advocate; a case reporter, Crime Liability Reporter; and offers continuing legal education programs to improve the quality of legal practice in this area of the law. The NCVBA also works to increase awareness among crime victim advocates and other professionals of the civil remedies available to victims of crime. The NCVBA is particularly interested in this brief

---

[1] The parties have consented to the submission of this brief. Their letters of consent have been lodged with the Clerk of this Court. None of the parties authored this brief in whole or in part, and no one other than *amici* or their counsel contributed money or services to the preparation or submission of this brief.

because of the organization's commitment to victims of domestic violence, stalking, sexual assault, child abuse, and all others who are granted orders of protection. The NCVBA's membership collectively has many decades of experience in representing these victims of crime in tort claims and can attest to the insufficiency of the available state tort remedies in this case.

SUMMARY OF ARGUMENT

Procedural due process cannot be satisfied in this case by post-deprivation tort remedies in Colorado state court. Petitioner and its *amici* wholly misapprehend the relationship between state tort law and federal due process jurisprudence, arguing both that Colorado tort remedies satisfy due process and also that the absence of a state tort corollary defeats Respondent's claim under 42 U.S.C. § 1983. Both arguments fail.

Post-deprivation remedies satisfy procedural due process only when two conditions are met. First, no viable pre-deprivation process can exist that could have prevented the harm. Second, the government's failure to provide process must be random and not the result of de facto state policy. Neither condition is satisfied in this case. Petitioner and its officers could have provided Respondent with an informal hearing before denying her entitlement to enforcement of the court's restraining order. Their failure to do so was the result of a policy of unresponsiveness to victims of violence. Accordingly, post-deprivation relief cannot fulfill the government's constitutional obligation to provide due process.

Conversely, the inadequacy of state tort law does not somehow demonstrate that no entitlement to enforcement exists, contrary to the alternative argument made by Petitioner and its *amici*. In fact, Congress enacted § 1983 for the very purpose of providing a federal claim when state

courts were complicit with local failures to prevent violence. Furthermore, property interests in government services almost always lack a corresponding state tort claim to compensate persons when those interests are deprived. Thus property interests can exist absent a state tort correlative.

The relationship between state tort law and federal due process jurisprudence in this case is far simpler than the version concocted by Petitioner. Tort law has for years proven inadequate as a deterrent against police indifference towards victims of violence. Petitioner's refusal to give reasoned consideration to Respondent's pleas for enforcement of her protection order is precisely the type of governmental inaction that motivated the Colorado General Assembly to pass a mandatory arrest statute.

The Colorado General Assembly enacted that statute, Colo. Rev. Stat. § 18-6-803.5, in response to a state and system-wide failure to provide effective protection to victims of domestic violence. Common law schemes did not provide the proper motivation, nor impose a sufficient legal duty upon the police to respond to calls for assistance by victims of violence. Tort suits against police and local governments failed to limit the social costs of violence and focused on compensation following violence rather than procedural protection to guard against violence in the first instance. This Court should follow the Assembly's intention in creating a mandatory duty to enforce a valid restraining order by holding that victims of violence are entitled to due process before the police can deprive them of their entitlement to enforcement.

ARGUMENT

I. THE AVAILABILITY OF A POST-DEPRIVATION STATE TORT REMEDY DOES NOT SATISFY THE REQUIREMENTS OF PROCEDURAL DUE PROCESS.

The availability of a post-deprivation state tort suit against the police does not fulfill the state's duty to provide due process to a victim of domestic violence who has obtained a valid restraining order. Petitioner has previously argued that post-deprivation relief adequately serves a victim who is denied enforcement of restraining order. Although Petitioner has seemingly abandoned that argument before this Court and therefore waived it, *see Baldwin v. Reese*, 124 S. Ct. 1347, 1352 (2004), it is nevertheless important to note that post-deprivation relief does not satisfy the requirements of due process in this case.

As a general principle, the mere existence of an alternative tort claim does not bar a claim brought under § 1983. To hold otherwise could negate almost all such claims because "[a]lmost every § 1983 claim can be favorably analogized to more than one of the ancient common-law forms of action." *Wilson v. Garcia*, 471 U.S. 261, 272-73 (1985). Thus, this Court stated in *Zinermon v. Burch*, 494 U.S. 113 (1990), that "overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983." *Id.* at 124. This Court further noted that "[a] plaintiff, under *Monroe v. Pape*, may invoke § 1983 regardless of any state tort remedy that might be available to compensate him for the deprivation of these rights." *Id.* at 125 (citing *Monroe v. Pape*, 365 U.S. 167 (1961)); *see also Monroe v. Pape*, 365 U.S. 167, 183 (1961) ("It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and

refused before the federal one is invoked."), *overruled on other grounds by Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 664-689 (1978). Section 1983 must be read in this way, or state governments could immunize their officers from § 1983 liability simply by enacting, but not enforcing, general statutes prohibiting officers from violating the Constitution.

With respect to procedural due process claims in particular, Petitioner's reliance below on this Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), is misplaced. In *Parratt*, this Court examined whether an official's negligent loss of a prisoner's property violated the prisoner's procedural due process rights given the existence of adequate post-deprivation procedural protections. *Id.* at 537. This Court concluded that post-deprivation process can satisfy procedural due process requirements in certain circumstances involving the loss of property, primarily where it is impractical to provide "a full and meaningful [pre-deprivation] hearing." *Id.* at 539-41. The mere fact that *some* remedy may be available later is insufficient, however. Such a post-deprivation remedy does not suffice for constitutional purposes if it does not provide "full compensation" for the loss. *Id.* at 543-44; *see also id.* at 540 ("The fundamental requirement of due process is the opportunity to be heard and it is an 'opportunity which must be granted at a meaningful time and in a meaningful manner.'") (internal citation omitted). As this Court stated in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), a post-deprivation process is constitutionally inadequate if it does not "make the complainant entirely whole." *Id.* at 436-37.

Parratt is inapposite also because the very nature of the deprivation there made pre-deprivation process infeasible. It was impossible to predict that a prison guard would lose the

prisoner's property and therefore impractical to hold a hearing prior to the loss. Similarly, no pre-deprivation process was practicable when the complained-of conduct was "a random, unauthorized personal vendetta against the prisoner," *Zinermon*, 494 U.S. at 130 (citing *Hudson v. Palmer*, 468 U.S. 517, 521 (1984)), and not the result of state custom or policy. *See also Albright v. Oliver*, 510 U.S. 266, 285 (1994) (Kennedy, J., concurring) (stating that the *Parratt* rule applies only "where an injury has been caused not by a state law, policy, or procedure, but by a random and unauthorized act"). *Parratt*, then, applies only in the "unusual case" in which pre-deprivation safeguards are impossible to achieve because the deprivation is not the result of state custom or policy and is impossible to predict. *Zinermon*, 494 U.S. at 129.

In this case, as Respondent pleaded in her Complaint, the Petitioner's failure to enforce her restraining order was a consequence of policy; it was not random or isolated. In addition, the long history of police non-enforcement of valid restraining orders makes the deprivation of Respondent's interest in enforcement entirely predictable. *See Zinermon*, 494 U.S. at 136-37 (explaining that pre-deprivation process is required when context renders action resulting in erroneous deprivation entirely predictable). Furthermore, in this case, adequate pre-deprivation process by the police would have substantially reduced the risk of an erroneous deprivation of Respondent's right to enforcement of the objective terms of the court order protecting Respondent and her children against her abusive husband. At the very least, the police could have provided Respondent with an informal "hearing" --in essence, a review of her complaint with the purpose of determining whether there was probable cause to believe that her estranged husband had violated the order--and notified her of their determination whether or not she met the criteria for mandatory arrest and what action they would take.

Petitioner's post-hoc suggestion that Respondent was not deprived of due process because she may now pursue a tort claim for negligence flies in the face of this Court's statement that, "[i]n situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking." *Id.* at 132.

II. STATE TORT SUITS ARE AN INADEQUATE REMEDY FOR DEPRIVATION OF THE ENTITLEMENT CREATED BY MANDATORY ARREST STATUTES.

A. Tort Law's Focus on Compensation for the Harms of Violence Rather Than on Pre-Deprivation Process Renders Its Remedies Structurally Inappropriate for the Type of Injury Suffered in This Case.

As this Court has observed, in most instances only pre-deprivation process--as opposed to a post-hoc damage award --can truly protect against wrongful deprivation of an entitlement:

> If the full right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. . . . [N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This Court has not . . . embraced the general proposition that a wrong may be done if it may be undone."

Fuentes v. Shevin, 407 U.S. 67, 81-82 (1972) (quoting *Stanley v. Illinois*, 405 U.S. 645, 647 (1972)).

The imperative of affording pre-deprivation process is particularly compelling in this setting, given the substantial

risks posed by erroneous deprivation. The failure by police to undertake the enforcement promised by mandatory arrest statutes inevitably compounds the magnitude of domestic violence and helps ensure its repetition. The costs of this violence are real and manifold: physical injury, lasting psychological harm, and economic effects due to lost short- and long-term earning potential. Andrea Brenneke, *Civil Rights for Battered Women: Axiomatic and Ignored*, 11 Law & Ineq. 1, 3 (1992) (cataloguing the injuries associated with domestic violence).

The consequences of domestic violence are so pervasive that its victims can never be made fully whole. Julie Goldscheid, *Crime Victim Compensation in a Post-9/11 World*, 79 Tul. L. Rev. 167, 177-81 (2004) (concluding that for victims of domestic violence, "[r]estitution is not likely ever to be sufficient to ensure full victim compensation"). This case provides a tragic illustration: what damage award can truly make Respondent whole for the loss of her children?[2] As empirical evidence has shown, when faced with legal regimes that do not effectively combat police failure to enforce restraining orders, most victims of domestic violence opt not to seek such post-deprivation remedies at all. Jennifer Wriggins, *Domestic Violence Torts*, 75 S. Cal. L. Rev. 121, 133-44 (2001).

Procedural due process doctrine thus represents a superior structure for protecting victims because its focus on property rights in enforcement leads to more consistent compliance with mandatory arrest statutes. By creating an entitlement to enforcement of restraining orders, these

[2] *Amici* acknowledge that the ultimate goal of Respondent's suit under § 1983 is to recover money damages as compensation for the deprivation of process and consequent deaths of her children. However, that fact does not detract from the importance of pre-deprivation process in the enforcement of protection orders.

statutes have focused the attention where it belongs: on police failure to provide citizens with the enforcement that they have been promised. Only process carried out prior to any deprivation of this entitlement effectively addresses and avoids the persistent failure of the police to act to protect domestic violence victims that motivated passage of the statute.

Enforcement of domestic violence mandatory arrest statutes through a focus on pre-deprivation procedure promises better police compliance for three reasons. First, the duties placed on local governments and their police departments are clear and can be readily met. Upon receiving a request to enforce a restraining order, police need provide only an informal "hearing" to the complainant in order to determine whether probable cause exists that a violation has occurred. Faced with a choice between possible § 1983 liability and compliance with these straightforward procedures, police are likely to opt for the latter.

Second, recent studies show that legal regimes focusing on the provision of adequate procedural treatment by police (rather than just compensating the victims injured by wrongful police inaction) are much more successful in ultimately encouraging victims of violence to work within the system. *See* Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 Buff. Crim. L. Rev. 801, 857 n.223 (2001) (citing *Family Protection and Domestic Violence Intervention Act of 1994: Evaluation of the Mandatory Arrest Provisions, Third Interim Report to the Governor and the Legislature* 53 (Oct. 2000) (available from the State of New York, Division of Criminal Justice Services) (interviews with battered women demonstrating that "[o]ne of the most powerful factors that seemed to determine victim satisfaction with the police was the manner in which the police treated the victim.")).

Improved cooperation between victims and the police ultimately limits the social costs of domestic violence and improves the deterrent effect intended by mandatory arrests statutes. Furthermore, by increasing victims' satisfaction with the system, it reduces the overall number of lawsuits filed against the police, minimizing municipal liability.

Finally, treating failure to enforce restraining orders as a problem of constitutional dimensions sends a strong and necessary message: domestic violence is not merely a matter of private violence but one that requires the application of public law. Brenneke, 11 Law & Ineq. at 22. Drawing attention to domestic violence as an issue of broad public concern thus promises to bring increased attention and lead to improved enforcement efforts and a reduction in domestic violence overall. Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 Wm. & Mary L. Rev. 1843, 1865 (2002) ("In the criminal justice system, mandatory policies represent an important symbolic shift; a declaration that the state no longer tolerates violence against women. Such policies force officials to take domestic violence seriously and protect victims. . . .") (footnote omitted).

B. Doctrinal Hurdles Render Tort Suits Ineffective as a Remedy for Erroneous Deprivation of Enforcement of a Protection Order.

Colorado state tort law also does not provide the process that is constitutionally required in this case, contrary to the assertions of Petitioner's *amici* and the dissenting opinion below. *See, e.g.*, Br. of *Amicus Curiae* United States of America at 25-26; Pet. App. 87a-88a n.19 (O'Brien, J., dissenting). "Seeking redress through a [state] tort suit is apt to be a lengthy and speculative process, which in a situation such as this one will never make the complainant entirely

whole." *Logan*, 455 U.S. at 436-37. In particular, two doctrinal hurdles undermine Colorado plaintiffs' ability to hold police officers liable for wrongful noncompliance with the mandatory arrest statute, thus leaving plaintiffs without meaningful tort remedies.

First, under Colorado sovereign immunity law, recovery in tort against a police department for the failure of its officers to enforce restraining orders requires a heightened showing of intent. Plaintiffs must show that the defendants' behavior amounted to "willful and wanton" conduct with respect to the substantive harm alleged--here, the deaths of Ms. Gonzales's children. *See* Colo. Rev. Stat. § 24-10-118(2).[3] Indeed, Colorado's courts have frequently rejected state law tort suits alleging that wrongful police inaction that eventually led to criminal conduct was sufficiently "willful and wanton" to overcome qualified immunity. *See Ruegsegger v. Jefferson County Bd. of County Comm'rs*, 197 F. Supp. 2d 1247, 1265 (D. Colo. 2001) (finding that police failure to enter school that was occupied by assailants was not willful and wanton conduct); *Rohrbough v. Stone*, 189 F. Supp. 2d 1088, 1096-98 (D. Colo. 2001) (finding that police

---

[3] In contrast, to allege a procedural due process claim under § 1983 theory, a plaintiff such as Ms. Gonzales need demonstrate only that the officers had a "willful and wanton" state of mind with respect to depriving her of her right to adequate process prior to denial of enforcement of her restraining order. *See Zinermon*, 494 U.S. at 137 (explaining that an allegation that state officials allowed an incompetent patient to "voluntarily" commit himself in "willful, wanton, and reckless disregard of his constitutional rights . . . means only that petitioners disregarded their duty to ensure that the proper procedures were followed, not that they . . . were bent on effecting the substantive deprivation and would have done so despite any and all predeprivation safeguards"); *Logan*, 455 U.S. at 436 (distinguishing the injury in § 1983 due process cases--deprivation of process inflicted by "established state procedure"--from the substantive harm eventually caused by that deprivation) (quotation marks and citation omitted).

failure to attempt rescue of besieged students who placed 911 call was not willful and wanton conduct); *Whitcomb v. City & County of Denver*, 731 P.2d 749, 751-52 (Colo. Ct. App. 1986) (finding that police officers' refusal to assist stranded motorist who was later assaulted was not willful and wanton conduct).

Second, the element of causation impedes the effectiveness of state tort suits as enforcement mechanisms for encouraging police responsiveness. The question of causation turns on foreseeability. *See Hook v. Lakeside Park Co.*, 351 P.2d 261, 265-66 (Colo. 1960). Under Colorado tort law, even if a defendant has acted wrongfully, no tort liability attaches to the wrongful conduct if the injury of which the plaintiff complains could not have been reasonably foreseen by the defendant. *See, e.g., Smith v. State Comp. Ins. Fund*, 749 P.2d 462, 464 (Colo. App. 1987) (finding no liability for negligent conduct where injury was not reasonably foreseeable). Because the injury in a domestic violence case results in part from the intervening violent act of the abuser, the link between police nonfeasance and the ultimate harm may be attenuated. The number of causal steps separating the initial wrongful act (police inaction) from its ultimate effect (domestic violence by another wrongful actor) raises doubts as to whether the injury at issue could reasonably have been foreseen. Indeed, courts have been reluctant to conclude that police inaction is the legal cause of criminal behavior. *See Leake v. Cain*, 720 P.2d 152, 160-61 (Colo. 1986); *Potter v. Thieman*, 770 P.2d 1348, 1351-52 (Colo. Ct. App. 1989); *Whitcomb*, 731 P.2d at 751-52.[4]

[4] In contrast, on a § 1983 procedural due process theory, proving causation in this context is relatively straightforward. An immediate causal relationship exists between police inaction and the harm suffered--that is, deprivation of a property interest without procedural due process. The police failed to provide Respondent with a determination akin to a hearing prior to arbitrarily denying her enforcement of a restraining order. Their inaction was the direct and immediate cause of her being deprived the right to enforcement of her restraining order. Thus, the connection between police inaction and harm is direct and clear.

Because the state tort claim available to individuals who have been deprived of their entitlement to enforcement of their restraining orders is unlikely to provide meaningful relief, the post-deprivation tort remedy does not provide the process that is constitutionally due to individuals like Respondent.

C. The Colorado General Assembly Recognized the Inadequacy of Its Tort Law in Establishing an Entitlement Under § 18-6-803.5(3)(b) Deserving of Pre-Deprivation Due Process.

The Colorado Assembly passed a mandatory arrest statute because it saw that the then-existing system was failing victims of violence. Representative Kearns, sponsor of the bill, stated in support of the legislation that "the entire criminal justice system must act in a consistent manner, *which does not now occur*. The police must make probable cause arrests." *Hearings on House Bill 1253 Before the House Comm. on the Judiciary* (Colo. Feb. 15, 1994) (statement of Rep. Kearns, sponsor) (emphasis added). Thus, the Assembly implicitly recognized the ineffectiveness of common law tort remedies in encouraging police responsiveness.

The Colorado Assembly could have focused on improving after-the-fact tort remedies--for example, by creating an exception to the sovereign immunity of public entities and officers when they fail to enforce restraining orders--but wisely chose a different approach. Instead, the Assembly chose a police enforcement and prevention

strategy. The central feature of the Colorado legislature's focus on enforcement and prevention was its decision to phrase § 18-6-803.5(3)(b) in mandatory terms, eliminating police discretion to enforce restraining orders, and thus creating an entitlement to enforcement when such orders are issued that enjoys constitutionally protected status. Colorado thus chose to follow a national trend of state legislative action to remedy police inaction and judicial inefficacy in providing effective remedies to victims of violence. *See* Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 Yale J.L. & Feminism 3 (1999) (detailing the history of state legislative action to curb domestic violence combined with police and judicial failure to enforce state legislation). The Assembly also included a provision immunizing police from wrongful arrest suits for overzealous enforcement of restraining orders. Colo. Rev. Stat. § 18-6-803.5(5). The Colorado lawmakers thus sought to reframe domestic violence law to entitle victims to enforcement of valid restraining orders, mandating that police take action to prevent injuries, rather than assuming that such prevention could be ensured by tort claims against the police after violence had occurred.

Petitioner argues that the sovereign immunity from tort suits enjoyed by Colorado's public officials and entities, which limits plaintiffs to recovery for "willful and wanton" conduct, implies that Colorado could not have intended to create an entitlement to enforcement that would permit a federal remedy more far-reaching than that permitted by state tort law. Pet'r's Br. at 27. This argument fails for several reasons. Petitioner fundamentally misapprehends the motive of the Assembly in passing § 18-6-803.5(3)(b). Had Colorado intended for this statute to be enforced through post-deprivation tort suits, then the Assembly would have amended the state's Governmental Immunity Act (GIA),

Colo. Rev. Stat. §§ 24-10-101, *et seq.*, to specifically exempt officers who failed to enforce mandatory restraining orders. That Colorado did not alter its own tort law indicates that the state intended for the mandatory restraining order statute to create not a right of recovery for damage caused by police nonfeasance under its own common law, but rather a pre-deprivation property right enforceable by means apart from a tort claim--- in all likelihood, through § 1983.

The implausibility of Petitioner's interpretation of the legislative history of § 18-6-803.5(3)(b) is further illustrated by its inconsistency with two basic canons of statutory construction. First, the GIA cannot be reasonably construed to operate as a limit on recovery via federal civil rights actions. On the contrary, such a result would suggest that state law limits recovery under federal statutes, and would thus run afoul of the federal Constitution's Supremacy Clause. U.S. Const. art. VI, § 2. This Court has consistently rejected interpretations of statutes that would render them unconstitutional. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994). Tellingly, Petitioner cannot identify a single case in which Colorado's state sovereign immunity statute has been invoked to limit recovery in a § 1983 procedural due process action. *See* Pet. App. 25a n.12 (citing state and federal cases illustrating this point).

Second, Petitioner's argument fails also because it would interpret § 18-6-803.5(3)(b) in a way that would add nothing to the enforcement regime that existed before its passage. Prior to passage of Colorado's restraining order statute, the only enforcement mechanism available to plaintiffs harmed by police inaction was a post-deprivation tort suit. Unless § 18-6-803.5(3)(b) is interpreted to create something meaningfully different--i.e., a property right that can serve as the predicate for pre-deprivation relief--it will function in a manner effectively indistinguishable from the previous

regime. That result is absurd and emasculates the statute. Indeed, this Court has rejected interpretations of statutes that render them redundant with earlier statutes. *See Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 526-27 (1981).

III. THE INADEQUACY OF STATE REMEDIAL SCHEMES NECESSITATES A FEDERAL REMEDY.

Congress enacted § 1983 precisely to provide a federal remedy when, as here, state remedies proved inadequate. Petitioner asserts, without support, that the absence of an adequate state tort remedy necessarily means that there can be no federal remedy. *See* Pet'r's Br. at 27. Petitioner misapprehends the relationship between state tort law and federal due process jurisprudence. In fact, federal law regularly corrects deficiencies in state tort law on an interstitial basis, and the remedy or lack thereof accorded by common law tort jurisprudence is irrelevant to the existence of a *Roth*-style property interest. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (explaining that property interests are created by state law securing benefits and supporting claims of entitlement to those benefits). Colorado's mandatory arrest law, in combination with a court order mandating enforcement of that law against particular parties, creates a property interest independent of the tort relief a party might seek following an incident of violence. Accordingly, the fact that Colorado provides inadequate tort relief to victims of violence in fact supports, and does not detract from, the existence of a federal remedy.

A. Finding a § 1983 Claim Where State Tort Law Is Deficient Is Consistent with the Legislative Intent of § 1983.

Section 1983, originally enacted as one of six sections of the Ku Klux Klan Act of 1871, arose out of congressional concern about uncontrolled violence in the South and the

failure of state police and state courts to control that violence. *See Wilson v. Garcia*, 471 U.S. 261, 276 (1985); *see also* Erwin Chemerinsky, *Federal Jurisdiction* § 8.2, at 454 (3d ed. 1999) (citing S. Rep. No. 42-1 (1871)). "It was the very ineffectiveness of state remedies that led Congress to enact the Civil Rights Acts in the first place. Congress therefore intended that the remedy provided in § 1983 be independently enforceable whether or not it duplicates a parallel state remedy." *Wilson*, 471 U.S. at 279 (footnote omitted). Congress further intended the statute as a basic alteration of the relationship between the federal government and the states. *See Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 502-03 (1982). This Court has stated that "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people . . . to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (internal quotation marks and citations omitted).

In *Monroe v. Pape*, 365 U.S. 167 (1961), this Court explained that § 1983 was intended to provide a federal remedy "where the state remedy, though adequate in theory, was not available in practice." 365 U.S. at 173-74. It has been suggested, both by Petitioner and Judge O'Brien in his dissenting opinion in the Tenth Circuit, Pet'r's Br. at 27, Pet. App. 82a-83a, that the absence of an adequate state tort remedy should compel this Court to refrain from providing Respondent with a federal remedy under § 1983. Yet, this Court rejected just that view in *Monroe*. When the states fail to provide redress to victims of violence despite state statutes and court orders creating a right to such protection, a federal remedy is most needed. The failure of the police to engage in any process whatsoever before denying Respondent the right to enforcement of her restraining order is precisely the type of state action that § 1983 was intended to redress.

B. Federal Law Often Recognizes a Property Interest Even When State Tort Law Provides No Adequate Remedy for Deprivation of That Interest.

This Court made clear in *Roth* that property interests are created by state statutes securing certain benefits and supporting claims of entitlement to those benefits. 408 U.S. at 577. The derivation of *Roth* property interests is not a survey of state tort law, as implied by Petitioner. *See Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972) ("'[P]roperty' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.' A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.") (citing *Roth,* 408 U.S. at 577).

In fact, examples abound of property interests meriting pre-deprivation due process but lacking a correlating tort claim. *Compare, e.g., Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (recognizing property interest in public benefits), *with Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51-52 (1987) (holding that plaintiffs may not bring common law claims of tortious breach of contract and bad faith for improper termination of disability benefits because such claims are preempted by ERISA); *see also Logan*, 455 U.S. at 428 (recognizing a property interest in causes of action); *Bell v. Burson*, 402 U.S. 535, 539 (1971) (recognizing a property interest in the right to operate a vehicle on state highways); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978) (finding a property interest in the receipt of government services); *cf. Bisbee v. Bey*, 39 F.3d 1096 (10th Cir. 1994) (in public-employment case, affirming district court order denying defendant's motion for summary

judgment on § 1983 claims and granting summary judgment on state tort claims). "It is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns." *Daniels v. Williams*, 474 U.S. 327, 333 (1986).

Just as the Due Process Clause should not be so stretched that it becomes "a font of tort law to be superimposed upon whatever systems may already be administered by the States," *id.* at 332 (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)), so too must tort law not act as a proxy for those property interests whose deprivations must be preceded by procedural due process. As Judge Kelly stated in the Tenth Circuit en banc decision below, "whether *state* tort law would recognize a legal duty of care for which damages may be awarded is a wholly separate question from (1) whether the officers were bound by the order and could be held to answer in contempt for any violation, and (2) whether the terms of the order create a non-discretionary entitlement." Pet'r's App. 54a (Kelly, J., concurring in part and dissenting in part). Whether or not Respondent may succeed in a state tort suit against Petitioner has no relevance to the fact that she has adequately pleaded a procedural due process violation actionable under § 1983.

CONCLUSION

The existence of tort relief in Colorado does not and cannot provide due process to victims of violence who are deprived of their entitlement to enforcement of a valid restraining order. The Colorado General Assembly enacted § 18-6-803.5(3)(b) to create an entitlement in the enforcement of a restraining order precisely because the Assembly saw that compensation after the fact did not truly compensate victims nor deter domestic violence. In keeping with the intent of the Colorado Assembly, this Court should

affirm the decision of the Tenth Circuit in denying Petitioner's motion to dismiss.

Respectfully submitted,

LORELIE S. MASTERS*
DAVID FAGUNDES
LINDSAY C. HARRISON
JENNER & BLOCK LLP
601 13th Street, NW
Washington, DC 20005
(202) 639-6000

February 10, 2005

* *Counsel of Record*

(15)

Supreme Court, U.S.
FILED
FEB 10 2005
OFFICE OF THE CLERK

No. 04-278

IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children, REBECCA GONZALES, KATHERYN GONZALES, and LESLIE GONZALES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF NATIONAL BLACK POLICE ASSOCIATION, NATIONAL ASSOCIATION OF BLACK LAW ENFORCEMENT OFFICERS, WOMEN IN FEDERAL LAW ENFORCEMENT, THE NATIONAL CENTER FOR WOMEN & POLICING, AND AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., AS *AMICI CURIAE* SUPPORTING RESPONDENT

JOAN S. MEIER
PROFESSOR OF CLINICAL LAW AND DIRECTOR, DOMESTIC VIOLENCE, LEGAL EMPOWERMENT AND APPEALS PROJECT
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
200 G Street, N.W.
Washington, D.C. 20052
(202) 994-2278

RICHARD W. SMITH
Counsel of Record
FRANCINE A. HOCHBERG
RICHARD L. SLOANE
MCDERMOTT WILL & EMERY LLP
600 13th Street, N.W.
Washington, D.C. 20005
(202) 756-8000

February 10, 2005

Counsel for Amici Curiae

TABLE OF CONTENTS

INTEREST OF THE AMICI CURIAE 1

STATUTORY PROVISIONS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. *DESHANEY* DOES NOT FORECLOSE RESPONDENT'S PROCEDURAL DUE PROCESS CLAIM. 3

A. The Due Process Claim At Issue Is Procedural, Not Substantive In Nature. 3

B. States Have Choice Under *DeShaney* To Create Property Rights In Police Protection. 4

II. COLORADO VESTED RESPONDENT WITH A PROPERTY INTEREST IN ENFORCEMENT OF HER PROTECTION ORDER. 7

A. Colorado Law Explicitly Mandates Enforcement of Protection Orders. 7

B. The Protection Order Personally Defined Respondent's Enforcement Right. 11

C. Respondent's Property Interest Is Not Defeated by the Police's Limited Discretion. 14

D. Respondent's Property Interest Is Not Contingent Upon The State's Provision of Private Remedies. 17

III. RESPONDENT WAS DENIED CONSTITUTIONAL DUE PROCESS, EVEN THOUGH IT COULD EASILY HAVE BEEN PROVIDED. 19

A. Respondent's Pleas For Enforcement Were Arbitrarily Ignored Without Meaningful Process. 19

B. The *Mathews* Factors Weigh Heavily In Favor Of Requiring Minimal Procedural Safeguards. 20

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Archie v. Racine, 847 F.2d 1222 (7th Cir. 1988) (*en banc*) 6

Bishop v. Wood, 426 U.S. 341 (1976) 4, 17

Board of Regents v. Roth, 408 U.S. 564 (1972) ..... passim

Boddie v. Connecticut, 401 U.S. 371 (1971) 5

Burella v. City of Philadelphia, No. 00-884, 2003 U.S. Dist. LEXIS 25170 (E.D. Pa. Dec. 17, 2003) 16, 26

Burson v. Freeman, 504 U.S. 191 (1992) 30

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) ..... passim

Coffman v. Wilson Police Department, 739 F. Supp. 257 (E.D. Pa. 1990) 11, 12, 16, 26

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 18

Dawson v. Milwaukee Housing Authority, 930 F.2d 1283 (7th Cir. 1991) 6

DeShaney v. Winnebego County Department of Social Services, 489 U.S. 189 (1989) 6

Doe by Fein v. District of Columbia, 93 F.3d 861 (D.C. Cir. 1996) 13

Doe by Nelson v. Milwaukee County, 903 F.2d 499 (7th Cir. 1990) 13

Goldberg v. Kelly, 397 U.S. 254 (1970) 7

Gonzaga University v. Doe, 536 U.S. 273 (2002)..... 18

Goss v. Lopez, 419 U.S. 565 (1975)..... 16, 17

Grant v. People, 48 P.3d 543 (Colo. 2002)..... 10

Hewitt v. Helms, 482 U.S. 755 (1987) 15

Hynson v. City of Chester, 731 F. Supp. 1236 (E.D. Pa. 1990)..... 26

Jones v. Union County, 296 F.3d 417 (6th Cir. 2002) 13

Kentucky Department of Corrections v. Thompson, 490 U.S. 454 (1989) 7, 15, 17

Logan v. Zimmerman Brush Company, 455 U.S. 422 (1982) 18

Mathews v. Eldridge, 424 U.S. 319 (1976)..... passim

Meador v. Cabinet for Human Resources, 902 F.2d 474 (6th Cir.) (1990) 16

Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978) 17

Morgan v. Genesee Co., LLC, 86 P.3d 388 (Colo. 2004) ... 9

Morrissey v. Brewer, 408 U.S. 471 (1972) 18, 20

NAACP v. Claiborne Hardware Company, 458 U.S. 886 (1982) 30

Nearing v. Weaver, 670 P.2d 137 (Or. 1983)..... 15, 17

Olim v. Wakinekoba, 461 U.S. 238 (1983)..... 7, 15

People v. Clark, 654 P.2d 847 (Colo. 1982) 9

People v. Guenther, 740 P.2d 971 (Colo. 1982) 9

Public Citizen v. United States, 491 U.S. 440 (1989)..... 10

Sandin v. Connor, 515 U.S. 472 (1995)..... 15

Siddle v. City of Cambridge, 761 F. Supp. 503 (S.D. Ohio 1991)..... 11, 12, 16

Taylor v. Armontrout, 894 F.2d 961 (8th Cir. 1989)..... 18

Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987) (*en banc*) (1989) 26

Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984)..... 22

Vitek v. Jones, 445 U.S. 480 (1980)..... 5, 7, 18

STATUTES

Colo. Rev. Stat. § 14-10-108(2)(b)-(c)..... 8

Colo. Rev. Stat. § 18-10-109..... 8

Colo. Rev. Stat. § 18-6-801.5..... 10

Colo. Rev. Stat. § 18-6-803.5..... 8

Pa. Cons. Stat. Ann. § 6113(a), (b) (2003)..... 26

OTHER AUTHORITIES

1 ABA Standards for Criminal Justice (2d ed. 1980 & Supp. 1986) 5

106 Harvard Law Review 1551 (1993) 30

Barbara J. Hart, *Arrest: What's the Big Deal*, 3 Wm. & Mary J. Women & L. 207, 212-214 (1997) 24

Casey Gwinn & Sgt. Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and Prosecutor*, 20 W. St. U. L. Rev. 298 (1993) 20

Colorado Coalition Against Domestic Violence, *Law Enforcement Training Manual* 2-2 (2d ed. 2003) ... 25, 28

Colorado Spring General Order 612 28

Colorado Spring Police Department, *General Order 510: Domestic Disturbances* (2003) 27

Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 Wm. & Mary L. Rev. 1843, 1851 (2002) 20

Domestic Violence Coordinating Council, *DVCC Model Law Enforcement Domestic Violence Policy* 25, 27

Domestic Violence State Coordinating Council, *Tennessee Domestic Abuse Benchbook* 7 VLA (1997) 27, 29

Executive Office of Public Safety, *Massachusetts Policy for Law Enforcement Response to Domestic Violence* 9-10 (2002) 27, 28, 29

Hearing on House Bill 1253 Before the House Judiciary Committee, 1994 Leg. Colo. 1994) 10

International Association of Chiefs of Police National Law Enforcement Policy Center, *Domestic Violence Concepts and Issues Paper* (Rev. 1996) 11

International Association of Chiefs of Police, *Model Policy* (rev. 1997) 8, 27, 29

James T.R. Jones, *Battered Spouses' Section 1983 Damage Actions Against the Unresponsive Police After* DeShaney, 93 West Virginia Law Review 251 (1991) ... 6

K.C. Davis, *Police Discretion* 144-45 (West 1975) 14

Kentucky Justice Cabinet & Governor's Council on Domestic Violence, *Model Domestic Violence Law Enforcement Policy* 25, 27, 28

Law Enforcement Comm. of the San Diego Domestic Violence Council, *Domestic Violence Law Enforcement Protocol* 27, 29

Letter from Lt. Healey, San Diego Family Justice Center, to Joan Meier (Feb. 7, 2005) 25, 26

Machaela M. Hoctor, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 Cal. L. Rev. 643 (1997) 20

Mary B. Malefyt, et al., *Assessing the Justice System Response to Violence Against Women: A Tool for Law Enforcement, Prosecution and the Courts to Use in Developing Effective Responses* (1998) 27, 28, 29

Mary B. Malefyt, et al., *Promising Practices: Improving the Criminal Justice System Response to Violence Against Women* (1998) 27, 28, 29

Melody K. Fuller & Janet L. Stansberry, *1994 Legislature Strengthens Domestic Violence Protection Orders*, 23 Colo. Law. 2327 (Oct. 1994) 10

Model Protocol for Police Response to Domestic Violence (2002) 25, 28, 29

National Center for Victims of Crime, *Newsletter of the Stalking Resource Center*, Fall 2004 ..... 22, 29

New Hampshire Governor's Commission on Domestic Violence, *Law Enforcement: A Model for Police Response to Domestic Violence Cases* 26

New Jersey Division of Criminal Justice, *Domestic Violence: Guidelines on Police Response Procedures in Domestic Violence Cases* 3 (1994) 28

New York Office for the Prevention of Domestic Violence, *Model Law Enforcement Policy Language* (1995) 28

North Carolina Governor's Crime Commission, Violence Against Women Committee, *Domestic Violence: Best Practices for Law Enforcement Response* (1998) 24

Police Chief's Association of Santa Clara County, *Domestic Violence Protocol for Law Enforcement* (2003) 28, 29

James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* (NEU Press 1999) 12

Quincy Court Model Domestic Abuse Program Manual. 20, 22, 27, 29

St. Louis County Sheriff's Office's Safety & Accountability Audit, *Domestic Violence Handbook & Training Guide* (2001) 28

David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 Sup. Ct. Rev. 53 (1989) 6

Susan Schecter, *Women & Male Violence* (1982) 19

Laurence Tribe, American Constitutional Law § 10-7, 503-04 (1978) 12

United States Department of Justice Office of Violence Against Women & IACP, *Protecting Victims of Domestic Violence: A Law Enforcement Officer's Guide to Enforcing Orders of Protection Nationwide* (App. E 44a) 27, 29

Marion Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, but is it Enough?* 1996 U.Ill. L. Rev. 533 ..... 11, 25

Wayne R. LaFave & Jerold H. Israel, *Crim. Procedure* (2d ed. 1992) 14, 18

Will County State Attorney's Office, *Domestic Violence Protocol* 28, 29

Wisconsin Department of Justice Crime Victims Council, *Model Domestic Violence Policies and Procedures* (2002) 28, 29

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV, § 1 ..... 1, 3

INTEREST OF THE AMICI CURIAE

The undersigned amici curiae are the National Black Police Association, National Association of Black Law Enforcement Officers, Women in Federal Law Enforcement, the National Center for Women & Policing, and Americans for Effective Law Enforcement, Inc.[1] Amici are law enforcement membership and educational organizations. They share an interest in the outcome of this case because they are committed to improving police responses to domestic violence, and believe that, if the allegations in this case are correct, the conduct of the Castle Rock Police Department fell far beneath acceptable police standards. Amici seek to inform this Court about the widely recognized and adopted standard practices utilized by police around the country in responding to domestic violence, and to emphasize that the constitutional procedures adopted here would establish only a minimal floor that is far less burdensome than the "best practices" already typically employed by law enforcement in domestic violence cases.

STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment provides, in relevant part, "nor shall any state deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Relevant state statutes are included in the appendix to this brief. *See* App. 1a-4a.

---

[1] Letters from the parties providing consent were submitted to the Clerk of the Court. Pursuant to Rule 37.6, amici state that no counsel for any party has authored any part of this brief, and no person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

1. Respondent does not seek to relitigate *DeShaney*, which was a substantive due process case rejecting a fundamental constitutional right to protection. Hers is a procedural due process claim of the sort that *DeShaney* expressly distinguished. Petitioner's assertion that *DeShaney* precludes her claim would mean that states cannot create benefits that are entitled to constitutional due process protection.

2. As a protected person under a Colorado domestic violence protection order, Respondent had a legitimate entitlement to police enforcement of the order. Colorado law explicitly dictates that police employ "every reasonable means to enforce" domestic violence protection orders, and the legislative intent confirms the mandatory nature of the statutory requirement. The protection order made the statutory benefit concrete and personal to Respondent. She was entitled (and reasonably expected) to rely on the promise of enforcement.

3. Respondent's enforcement right is sufficiently certain to create a legitimate entitlement. The Colorado statute eliminates meaningful police discretion, and what remains is no more than this Court has repeatedly allowed while still finding an entitlement. Petitioner's suggestion that the Constitution cannot require more procedures than the State itself provides rehashes an argument this Court has repeatedly rejected.

4. The police ignored Respondent and denied her repeated pleas for enforcement without reasoned consideration. No matter how appropriate process is defined, she was not provided it.

5. The Respondent's interest, the risk of erroneous deprivation and value of additional process, and the government's interest, all militate in favor of establishing a procedural floor for these police decisions. Implementing such procedures would not detrimentally affect law enforcement. Current police practices in domestic violence cases far exceed the *en banc* court's constitutional minimum.

ARGUMENT

I. *DESHANEY* DOES NOT FORECLOSE RESPONDENT'S PROCEDURAL DUE PROCESS CLAIM.

A. The Due Process Claim At Issue Is Procedural, Not Substantive In Nature.

Petitioner seeks to conflate substantive and procedural due process by observing that "the alleged procedural failing derives only from the lack of a favorable result, and the only curative procedural remedy would presumably be one that guaranteed Ms. Gonzales a different result." *See* Pet Br. 13. This observation is a mere truism because all due process claims, by definition, require an allegation that the state denied life, liberty, or property.[2] The difference between substantive and procedural claims is not in whether the plaintiff alleges that she was deprived of a substantive benefit (to have an injury, she always must). Rather, it is in whether the plaintiff alleges that the denial is caused by the failure of the state to employ adequate procedures to guard against

---

[2] Were Petitioner correct, every complaint alleging a due process violation as a result of the denial of a substantive benefit would be a *de facto* substantive due process complaint, and no plaintiff could state a proper claim for denial of procedural due process. *See* U.S. Const. amend. XIV, § 1 (state may not "*deprive* any person of life, liberty, or property, without due process of law.") (emphasis added).

erroneous deprivation (procedural due process), or the failure of the state to provide an adequate justification for its action (substantive due process).

To be sure, Respondent believes that her pleas for enforcement should have been heeded and the murder of her three girls averted. But at base she claims that Petitioner ignored her requests for assistance. In fact, she alleges that Petitioner's policy and practice is to ignore requests like hers without employing any procedural protections at all. PA 129a. Had minimal fair process been employed, she would not have been erroneously deprived of the enforcement to which she was entitled. She stated a claim for denial of procedural due process that is separate entirely from her dismissed claim for denial of substantive due process.

B. States Have Power Under *DeShaney* To Create Property Rights In Police Protection.

Petitioner asks this Court to carve out a special exception to the states' historic ability to create property rights, asserting that *DeShaney* precludes states from "*ever* recognizing a non-traditional *Roth*-type property interest in police enforcement procedures." Pet. Br. 12. Petitioner's position is contradicted by the United States, which recognizes that "courts should recognize an entitlement to enforcement ... when the legislature has clearly indicated that to be its intent," U.S. Br. 9, and is unsupportable under *DeShaney* and this Court's due process jurisprudence.

States are always free to provide their citizens whatever benefits they choose and to create whatever property rights that follow. *See Bishop v. Wood*, 426 U.S. 341, 344 (1976) ("[T]he sufficiency of the claim of entitlement must be decided by reference to state law."); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (property rights may "stem from an independent source such as state law"). This Court's

jurisprudence is replete with examples of states creating protected property and liberty interests in rights that, like police protection, do not spring from the Constitution. *See Vitek v. Jones*, 445 U.S. 480, 488 (1980) ("There is no 'constitutional or inherent right to parole,' but once a State grants a prisoner the conditional liberty properly dependent on the observance of special parole restrictions, due process protections attach to the decision to revolve parole.") (citations omitted). Indeed, 30 years ago, this Court "fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights." *Roth*, 408 U.S. at 571.

Should they choose to do so, the states are no less able to create property rights in police enforcement than they are in previously recognized benefits. Police enforcement of domestic violence protection orders is at least as compelling as other so-called "*Roth*-type" property interests. *See* Br. of *Amici Curiae* Nat'l Network to End Domestic Violence ("NNEDV") at 7, 19-20, 25-29. The fact that police protection is a critical service of civil society that is monopolized by the State suggests that police protection should be more, not less, subject to the requirements of procedural due process. "[D]ue process of law ... command[s] that public agencies ... such as the police, which possesses broad and virtually monopolistic powers to use force and restraint upon the citizenry – act according to uniform, visible, and regular rules of law. When the extraordinary powers of the police are used unconstrainedly – that is, in the absence of such rules – they are used arbitrarily in a constitutional sense, in violation of due process" 1 ABA Standards for Criminal Justice, 1-4.5, comment. 1-124 (2d ed. 1980 & Supp. 1986) (quoting *Amsterdam*, The Supreme Court and the Rights of Suspects in Criminal Cases). *See Boddie v. Connecticut*, 401 U.S. 371 (1971) (state monopolization of process for divorce requires it to make

process accessible to all); *Archie v. Racine*, 847 F.2d 1211 (7th Cir. 1988) (*en banc*) ("When a state cuts off sources of private aid, it must provide replacement protection"), *cert. denied*, 489 U.S. 1065, 1223 (1989); *Dawson v. Milwaukee Hous. Auth.*, 930 F.2d 1283, 1284 (7th Cir. 1991) (citing *Archie* for proposition that "state may constrain [liberty] indirectly as well as directly – by suppressing private alternatives as well as by preventing self-help").

Certainly, *DeShaney* does not restrain state power.[3] *DeShaney* held only that the Constitution does not "impose on state and local governments an affirmative obligation to prevent private-party violence." *DeShaney v. Winnebego Cnty Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). And as even Petitioner is forced to concede, Pet. Br. 15, *DeShaney* explicitly contemplated that a state might afford its citizens "an 'entitlement' to receive protective services in accordance with the terms of the statute, an entitlement which would enjoy due process protection against state deprivation under ... *Roth*." *DeShaney*, 489 U.S. at 195 n.2.

[3] Petitioner relies on two out-of-context quotations from legal commentators, both of whom support Respondent. *See* Pet. Br. 15-16 (citing Profs. Jones and Strauss). Jones concludes that plaintiffs who "were the holders of valid state orders of protection the police refused to enforce without first offering them procedural due process in the form of predeprivation notice and a hearing on the refusal, ... may have a viable procedural due process claim." *See* Jones, *Battered Spouses' Section 1983 Damage Actions Against the Unresponsive Police After* DeShaney, 93 W.Va. L. Rev. 251, 351 (1991) . Strauss, an outspoken *DeShaney* critic, recognized that its "limited" holding "left open the possibility that persons ... might recover under the procedural components if they could show that state law created an 'entitlement' to receive protective services in accordance with the terms of [a] statute." *See* Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 Sup. Ct. Rev. 53, 56 (1989) (quoting *DeShaney*, 489 U.S. at 195 n.2).

II. COLORADO VESTED RESPONDENT WITH A PROPERTY INTEREST IN ENFORCEMENT OF HER PROTECTION ORDER.

The state of Colorado conferred upon Respondent a protected property interest in police enforcement of her protection order. The interest originated in Colorado law -- which requires that police enforce domestic violence protection orders -- and was bestowed upon Respondent individually when a Colorado court determined that her estranged husband posed a threat to her and her children and issued to her a protection order with explicit instructions to police and notice to her that it must be enforced.

A person obtains a property interest in a state benefit when she has "a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577. The touchstone of entitlement is mutual expectation. *Kentucky Dep't of Corrs. v. Thompson*, 490 U.S. 454, 465 (1989) ("objective expectation"); *Vitek*, 445 U.S. at 489 ("justifiable expectations"); *see also Roth*, 408 U.S. at 577 ("more than a unilateral expectation"). States may create entitlements for a particular class of individuals if they define benefits and purposefully guide their officials to distribute those benefits to the class. *See Roth*, 408 U.S. at 577; *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). States do not create entitlements if they merely allow officials to award or deny benefits "for whatever reason or for no reason at all." *Olim v. Wakinekoba*, 461 U.S. 238 (1983) (quotation marks and citation omitted); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543-44 & n.9 (1985) (recognizing property interest despite discretion).

A. Colorado Law Explicitly Mandates Enforcement of Protection Orders.

Colorado law authorizes courts to issue protection orders in family cases and unambiguously requires state police to

enforce them. Respondent obtained her protection order pursuant to Section 14-10-108(2)(b)-(c) of the Uniform Dissolution of Marriage Act, which authorizes state courts to award an order "enjoining a party from molesting or disturbing the peace of the other party or of any child [or] excluding a party from the family home ... upon a showing that physical or emotional harm would otherwise result." Colo. Rev. Stat. § 14-10-108(2)(b)-(c).

Once the state court awarded the protection order to Respondent and the order was served on Mr. Gonzales, its enforcement was made mandatory by Section 18-6-803.5. *See id.* § 14-10-109 ("the duties of police officers enforcing orders issued pursuant to ... 14-10-108 shall be in accordance with section 18-6-803.5"). That section requires that "[a] peace officer *shall* use *every* reasonable means to enforce a restraining order." *See id.* § 18-6-803.5(a) (emphasis added).

Petitioner and the United States contend that, despite the express terms of the statute, it does not create any mandatory benefit. This contention is unavailing for several reasons.

First, Petitioner and its supporting amici wrongly frame this case as concerning an entitlement to "arrest." U.S. Br. 15, *et seq.* In fact, Respondent's claim is for "every reasonable means to enforce" the protection order, PA 128a. "Enforcement," as used in the Colorado statute, may include arrest, and often must. But it may alternatively or additionally include obtaining a warrant or securing children.[4] While

[4] Police commonly understand that they play a critical protective role in domestic violence cases that is only partially defined by the power to arrest. *Cf. e.g.*, Int'l Ass'n of Chiefs of Police ("IACP"), *Model Policy* (rev. 1997) ("IACP Policy") (App. B 9a) (requiring officers to provide assistance to victims, batterers, and children, including to "[e]nsure the safety of the children"). The IACP Policy treats arrest as non-mandatory, but treats the obligation to ensure the safety of children and parties as

(continued...)

amici believe an arrest was in fact mandated here, this Court need not decide whether Respondent had a protected property interest in an arrest *per se*. If, as the *en banc* court of appeals found, the state created an entitlement to "enforcement," regardless of the means chosen to effect it, she stated a claim.

Putting aside the specific duty to *arrest*, Petitioner and the United States concede that under the plain meaning of the statute, some *enforcement* is required. *See* Pet. Br. 28 (dismissing "shall arrest" language because seen as inconsistent with every "'reasonable means' requirement of the first sentence"); U.S. Br. 15 (reading arrest provision in context of "*command* that immediately precedes it, which provides that police 'shall use every reasonable means to enforce' a protection order") (emphasis altered).

Second, Petitioner and the United States ignore Colorado precedent regarding the meaning of the word "shall" in a statute. *People v. Guenther*, 740 P.2d 971, 975 (Colo. 1982) ("shall" has a "mandatory connotation"); *People v. Clark*, 654 P.2d 847, 848 (Colo. 1982). Where the use of the mandatory "shall" is unambiguous, as it is here, the statute is presumed to be mandatory. *Morgan v. Genesee Co., LLC*, 86 P.3d 388, 393 (Colo. 2004) (applying presumption under Colorado law that "shall" is mandatory). Petitioner argues that this presumption is overcome on a showing that "the context indicates otherwise." Pet. Br. 29-30 (citing *DiMarco v. Department of Rev.*, 857 P.2d 1349, 1352 (Colo. App.

mandatory. *Compare id.* 8a (officers "should" arrest), *with id.* 9a ("officers are required to assist ... the parties [and] ensure the safety of children"). Excerpts of various police policies, including the IACP Policy, are included in the appendices to this brief ("App."). Due to the number of the cited policies, amici have included only five in the appendix; most, however, are available in their entirety via the internet; the remainder are in the possession of counsel.

1993)). But in this context, Petitioner has made no such showing, nor can it. *See* Hearing on H.B. 1253 Before the House Judiciary Comm. ("Hearings"), 1994 Leg. Colo. 1994) (statement of Rep. Kerns, sponsor) ("The police must make probable cause arrests."); *cf.* Br. of *Amici Curiae* Nat'l Coalition Against Domestic Violence ("NCADV") at IV (domestic violence mandatory arrest statutes are intended to mandate arrest and terminate discretion).

Third, the legislative history of the statute confirms that the enforcement provisions are mandatory. *See Public Citizen v. United States*, 491 U.S. 440, 454-55 (1989) (referring to legislative history); *Grant v. People*, 48 P.3d 543, 546-47 (Colo. 2002). The Colorado legislature adopted the mandatory enforcement statute specifically to protect women and children (such as Respondent) against abusive spouses and to remedy the police's long history of refusing to intervene on behalf of victims of domestic violence. *See* PA 25a ("The Colorado legislature clearly wanted to alter the fact that the police were not enforcing domestic abuse restraining orders."). In 1994, when the mandatory enforcement provisions were enacted, it was understood that domestic violence was "the single largest cause of injury to women in the United States, more common than auto accidents, muggings, and rapes combined." *See* Fuller & Stansberry, *1994 Legislature Strengthens Domestic Violence Protection Orders*, 23 Colo. Law. 2327 (Oct. 1994); Colo. Rev. Stat. § 18-6-801.5 (finding that "domestic violence is frequently cyclical in nature, involves patterns of abuse, and can consist of harm with escalating levels of seriousness"). Colorado's criminal justice system was seen by the statutes' primary sponsors in the legislature as inconsistent and flawed. *See* Hearings, *supra* (statement of Rep. DeGette, sponsor) (Colorado's "domestic violence laws are lagging behind"); *id.* (statement of Rep. Kerns, sponsor) ("[T]he entire criminal justice system must act in a consistent

manner, which does not now occur."). The legislature "wanted to put together a bill that would really attack the domestic violence problems ... and that is that the perpetrator has to be held accountable for his actions, and that the victim needs to be made to feel safe." *Id.* The legislature's solution, among other things, was to *mandate* enforcement of protection orders, thereby purposefully and intentionally empowering protected parties with the expectation of safety and statutorily reversing the history of police indifference. *See id.* ("The police must make probable cause arrests. The prosecutors must prosecute every case."); Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, but is it Enough?*, 1996 U. Ill. L. Rev. 533, 541-542 (1996) (noting statutes only *permitting* arrest had little effect, leading to mandatory statutes); IACP National Law Enforcement Pol'y Ctr., *Domestic Violence Concepts and Issues Paper* (Rev. 1996) ("IACP Concept Paper") (App. C 23a) (discussing differences between mandatory and preferred arrest statutes).

In short, if the Colorado domestic violence statute, with its plain meaning and clear legislative purpose, does not mandate enforcement, it is difficult to imagine how a state legislature could ever do so.

B. The Protection Order Personally Defined Respondent's Enforcement Right.

Respondent had a property right in enforcement because the Colorado protection order personally defined for her an otherwise general right of police enforcement. *See Siddle v. City of Cambridge*, 761 F. Supp. 503, 509 (S.D. Ohio 1991) ("[W]hen a protective order exists, as in this case, there is a governmental duty to protect the individual."); *Coffman v. Wilson Police Dep't*, 739 F. Supp. 257, 264-65 (E.D. Pa. 1990) (finding that ordinarily "the duty to protect is owed by

a municipality to the citizenry as a whole, rather to any individual," but "the orders of court create a property interest in police enforcement that is cognizable under *Roth*"). "The case for due process protection grows stronger as the identity of the persons affected by a governmental choice becomes clearer; and the case becomes stronger still as the precise nature of the effect on each individual comes more determinately within the decisionmaker's purview." Tribe, *American Constitutional Law* § 10-7, 503-04 (1978).

In arguing that the order is not binding on police, Petitioner and the United States misapprehend its import, which was to take the ephemeral rights described in the statute and to make them concretely Respondent's. *See Siddle*, 761 F. Supp. at 509 (explaining effect of order); *Coffman*, 739 F. Supp. at 264-65 (same).

Petitioner and the United States wrongly assume that the order had only the effect of an injunction. The police are required to enforce the order, not because the protection order enjoined them, but because the *statute* required its enforcement. The statutory summary on the order's backside was not an injunction; it simply provided supplementary notice to Respondent and to police that the statute must be heeded. Respondent was entitled to rely on the order, the essence of which was enforcement. *See Roth*, 408 U.S. at 577 ("[I]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined."). Indeed, both the police and the courts regularly instruct victims of domestic violence that protection orders will entitle them to increased police protection, and victims typically rely on this expectation. *See* Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* 161 (NEU Press 1999).

The Respondent's protection order evinced a judicial determination that she was within the class of persons entitled to receive the statutory benefit of enforcement. Once that individualized determination was made, it could not be withdrawn without adequate procedures. Thus, the cases cited by Petitioner and the United States are distinguishable. In neither *Doe by Fein v. District of Columbia*, 93 F.3d 861 (D.C. Cir. 1996), *Doe by Nelson v. Milwaukee Cnty*, 903 F.2d 499 (7th Cir. 1990), nor *Jones v. Union Cnty*, 296 F.3d 417 (6th Cir. 2002) was the court asked to determine whether a plaintiff had a property right in a protection order. Rather, the courts held only that their plaintiffs did not have a right "in the rare air" to government services, including protection under a general statute.[5]

---

[5] In *Doe by Nelson*, for example, the court determined that a minor plaintiff could not base a procedural due process claim on the state's failure to investigate a child abuse complaint within 24 hours of its filing, as state law required. 903 F.2d at 502. Unlike in this case, where Respondent "securely and durably" holds the protective order and clearly benefits from its enforcement, the *Doe by Nelson* court reasoned that there was no clear beneficiary for the investigation. *Id.* at 504 ("it is impossible to say that the right to an investigation of a report of child abuse 'securely and durably' belongs to anyone at all"). These cases also demonstrate that the enforcement requirement here directs a substantive benefit, and not a precatory procedural guideline as Petitioner and the United States suggest. Pet. Br. 30-32; U.S. Br. 21. The plaintiff in *Doe by Nelson* claimed an entitlement to investigatory procedures on a timetable that was intended only to guide the internal processes of government and on which she did not rely. The *Doe by Nelson* court rejected the claim, in part, because the contingent derivative benefits that may derive from an investigation were too indirect. *Doe by Nelson*, 903 F.2d at 504. Here, by contrast, enforcement of the protective order is not a procedure, but a substantive result that confers a direct benefit relied on by the protected party.

C. Respondent's Property Interest Is Not Defeated by the Police's Limited Discretion.

Petitioner (at 25-30) and the United States (at 15-22) argue that police retain significant discretion under the statute for three reasons: 1) police discretion cannot be eliminated even by statutory mandates; 2) the statute itself contemplates substantial police discretion; and 3) a probable cause determination requires some discretion. These arguments vastly overstate whatever discretion remains in this purposefully mandatory statute, and underestimate the amount of discretion needed to defeat an entitlement.

First, the idea that police always retain discretion derives largely from treatises discussing only traditional criminal statutes using "shall."[6] Whether or not there is any validity to this notion in that context,[7] it cannot possibly apply to domestic violence enforcement statutes such as Colorado's, which were enacted for the specific purpose of eliminating the police's infamous history of abusing their discretion by failing to enforce protection orders. *See* PA 25a ("The Colorado legislature clearly wanted to alter the fact that the police were not enforcing domestic abuse restraining

[6] The Petitioner notes Kenneth Culp Davis's theories of police discretion, cited by Judge Hartz. PA 92a-93a. While Davis does not think that police discretion can be entirely eliminated, he argues that discretion "should be confined, structured, and checked" because "discretion that is checked is obviously less likely to be arbitrary than discretion that is unchecked." Davis, *Police Discretion* 144-45 (West 1975). Davis's book predates domestic violence mandatory enforcement statutes; thus, it does not respond to statutes, such as this one, that purposefully eliminate discretion that has been systematically abused.

[7] LaFave acknowledges: "[a]rrest statutes are commonly drafted in mandatory terms, and on the infrequent occasions when courts are called upon to speak to the question they typically assert that the police lack authority not to invoke the criminal process when the evidence is sufficient to arrest." LaFave & Israel, *Crim. Procedure* 625 (2d ed. 1992).

orders."); *cf. Nearing v. Weaver*, 670 P.2d 137, 142 (Or. 1983) (describing purpose of Oregon mandatory enforcement statute as "to negate any discretion...in enforcing restraining orders issued under Oregon's Abuse Prevention Act"). If the legislative command is to mean anything, it is that the Colorado police no longer have discretion regarding whether to enforce protection orders.

Second, Petitioner conflates the Colorado statute's various *means* (which include arrest, warrant, etc.) with its singular *end* (which in accordance with the plain language and legislative intent, is unambiguously to enforce protection orders by "every reasonable means"). Petitioner argues that the phrase "every reasonable means" contemplates discretion and that the police must use discretion to decline arrests when violations are *de minimis*. *See* Pet. Br. 28 ("step back" order in response to restrained person stepping one yard inside restricted zone). In objectively *de minimis* situations, arrest may or may not be required. But that does not dilute the absolute requirement of "*enforcement*," and the word "every" which precedes it makes clear that "enforcement" is absolutely required. In short, whatever discretion the police possess with respect to the statute is constrained to selecting the means but not the end of enforcement.[8] This is directly

[8] Petitioner further argues that because two options -- an arrest and a warrant for arrest -- may be construed as "reasonable means to enforce," enforcement is not a "particular" enough result to create a property interest. Pet. Br. 29 (citing *Thompson*, *Olim*, and *Sandin*). This argument misconstrues the cases. The particularity rule Petitioner seeks to impose is not the "holding" in *Sandin* as Petitioner represents, but rather the "undesirable" *Hewitt* methodology (followed by *Thompson* and *Olim*) that *Sandin* expressly rejects. *See Sandin v. Connor*, 515 U.S. 472, 482, 483 n.5 (1995) (citing *Hewitt v. Helms*, 482 U.S. 755 (1987)). Moreover, even before it was abandoned, the *Hewitt* methodology was typically employed only in prison liberty cases, where it wrongly "encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges." *Id.* at 481.

(continued...)

analogous to cases involving property rights (e.g. public education), where discretion to choose precise means (curricula) are left to decisionmakers (individual teachers), but the entitlement (education) is required. *See, e.g., Goss v. Lopez*, 419 U.S. 565, 573-74 (1975).

Every court we are aware of that has examined the effect of a court order awarded pursuant to a mandatory enforcement statute has agreed that the combination creates a property interest, even if discretion remains to determine "reasonable means." *See Meador v. Cabinet for Human Res.*, 902 F.2d 474, 476-77 (6th Cir.), *cert. denied*, 498 U.S. 867 (1990); *Siddle*, 761 F. Supp. at 509; *Coffman*, 739 F. Supp. at 257, 263-66; *Burella v. City of Philadelphia*, No. 00-884, 2003 U.S. Dist. LEXIS 25170 (E.D. Pa. Dec. 17, 2003).

Third, contrary to Petitioner's claim, the probable cause determination, while sometimes requiring the exercise of limited discretion, does not undermine the entitlement. This Court routinely finds protected interests arising out of state statutes and policies that allow much more discretion than whatever discretion is implicit in a probable cause determination. In *Loudermill*, for example, the Court noted that an Ohio statute "plainly" created a property interest in continued public employment, despite the fact that it allowed removal for subjective "incompetency, inefficiency, dishonesty, . . . immoral conduct, insubordination, discourteous treatment . . . or any other failure of good

---

Faced with negative inference prisoner liability claims, some courts required particular results. *See id.* Non-prisoner property cases based on positive law do not suffer from the same problems, and need not meet the same test. In this case, the particular result is adequately defined. There can be only one result -- that the precise terms of the protection order are enforced. Whether that is accomplished by means of arrest; retrieving the children; a "step-back" instruction, Pet. Br. 28; or otherwise, is irrelevant.

behavior." 470 U.S. at 538-39 & n.4. The Court expressly acknowledged that the decisionmaker retained "discretion" under the statute, and that the issues raised by *Loudermill* were "subjective." *Id.* at 543-44 & n.9. *See also Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11 (1978) (receipt of services from public utility terminable for "good and sufficient cause"); *Bishop*, 426 U.S. at 345 n.8 (finding that public employment was terminable "at will," rather than for cause); *Goss*, 419 U.S. at 573-574 (public education may be suspended for "misconduct"); *Nearing*, 670 P.2d at 142 at n.7 (finding no discretion in similar statute's probable cause requirement).

D. Respondent's Property Interest Is Not Contingent Upon The State's Provision of Private Remedies.

The United States argues that Colorado law cannot be read to provide a property right in enforcement because it does not also provide a private right of action "to enforce the statute against the police officials." U.S. Br. 17 (punctuation marks removed) (quoting *Thompson*, 490 U.S. at 454, 460 (1989). The argument misconstrues *Thompson* and confuses the state's right to define property with its obligation to provide constitutional procedure.

Thompson did not, as the United States suggests (at 17), condition property rights on an ability "to enforce the[] [statute] against the [police] officials," and we are aware of no case that has so held. *Thompson* was a liberty case in which prisoners claimed to have an interest in open visitation stemming from a prison policy memorandum. After concluding that the policies were not mandatory such that they created a legitimate expectation of open visitation (an analytic dismissed by *Sandin*), the Court summarized that no inmate "could reasonably expect to enforce them against the prison officials." *Thompson*, 490 U.S. at 465. The court did

not purport to condition the liberty interest on the availability of procedures to enforce, and lower courts referencing the language have not done so either. *Taylor v. Armontrout*, 894 F.2d 961, 965 (8th Cir. 1989) (finding an "inmate, ... could reasonably expect to enforce [policy] against the prison officials," but not analyzing whether state cause of action existed).[9]

Moreover, a rule requiring a private cause of action or other post-deprivation process as a condition for finding a protected interest cannot be squared with this Court's jurisprudence which clearly indicates otherwise. *See e.g., Loudermill*, 470 U.S. at 541; *Vitek*, 445 U.S. at 491; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). In *Loudermill*, this Court clarified that "[t]he categories of substance and procedure are distinct.... 'Property' cannot be defined by the procedures provided for its deprivation any more than can life or liberty." 470 U.S. at 541. Once the determination is made that state law creates a property interest, "the question remains what process is due," *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), but [t]he answer to that question is not to be found in the [state]

[9] Because this Court has not conditioned the existence of protected interests on claimants' ability to enforce statutes against state decisionmakers, the Court need not reach the United States' standing or justiciability arguments. Nonetheless, both arguments fail. On the standing point, the United States cites *Gonzaga* to argue that there must be "rights-creating" language to support a claim, but in that case plaintiff sought to use § 1983 to enforce a federal statute, not to remedy a federal constitutional violation. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002). The justiciability argument focuses on courts' disinclination to review *prosecutorial* discretion, not police discretion. *See LaFave & Israel, supra,* at 625 ("in the eyes of the law, discretion by the prosecutor is considered proper while discretion by the police is with rare exception viewed with disfavor"). This Court has not hesitated to review police conduct. *See e.g., County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (reviewing police discretion).

statute." *Loudermill*, 470 U.S. at 541. Petitioner's argument would negate due process entirely -- the right exists to ensure sufficient due process when the state fails to provide it.

III. RESPONDENT WAS DENIED CONSTITUTIONAL DUE PROCESS, EVEN THOUGH IT COULD EASILY HAVE BEEN PROVIDED.

A. Respondent's Pleas For Enforcement Were Arbitrarily Ignored Without Meaningful Process.

The essence of Respondent's complaint is that Petitioner arbitrarily ignored Respondent without employing *any valid process at all*. *See* PA 126a-127a. Petitioner did not truly engage in an "informal consultation" with Respondent (who was "the principal or only witness available to police at the time"), nor did Petitioner make "an initial enforcement decision" after meaningfully considering her request. U.S. Br. 29. Instead, while going through the motions of responding, Petitioner merely "repeatedly ignored and refused her requests for enforcement." PA 31a. Despite Respondent's five calls in five hours and midnight visit to the police station, Petitioner merely turned her away, telling Respondent that "there was nothing they could do"[10] and to "call back later." Indeed, the Complaint alleges that the Petitioner's police department maintains an "official policy or custom that recklessly disregards" its duty to enforce protection orders. PA 129a.

While it is true that Petitioner repeatedly took Respondent's calls, PA 126a-127a, and that Petitioner

[10] Ptacek, *supra*, at 162 (police often tell women that they "can't do anything" to enforce protection orders or that police action is "waste of time," especially if the abuser is not present); Schecter, *Women & Male Violence* (1982) (police used to tell battered women "[t]here's nothing we can do. It's a family matter").

allowed Respondent to file an incident report, PA 127a, those reflexive responses do not equate with genuine "process." They were mere lipservice.[11] *See* Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence,* 43 Wm. & Mary L. Rev. 1843, 1851 (2002) (describing "call us again" response as common means of ignoring or delaying response to victims of domestic violence); Hoctor, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 Cal. L. Rev. 643, 649 (1997) ("Police treatment of domestic abuse calls has traditionally consisted of . . . purposefully delaying response, even for several hours. . ."); *Quincy Court Model Domestic Abuse Program Manual* 17 ("Quincy Manual") (describing infamous case in which police brought victim to police station, spoke with her, and then took her home, only for her abuser to murder her entire family before they took action) ("Quincy Case"). This historic police practice of ignoring and putting off victims of domestic violence is well-recognized,[12] and is precisely why enforcement statutes like Colorado's are mandatory.

B. The *Mathews* Factors Weigh Heavily In Favor Of Requiring Minimal Procedural Safeguards.

The United States correctly notes that "due process is flexible and calls for such procedural protections as the particular situation demands." U.S. Br. 26 (citing *Morrissey*, 408 U.S. at 481). While clearly no *formal* hearing can be expected in this context, if the police are to afford holders of

[11] *Cf.* Gwinn & O'Dell, *Stopping the Violence: The Role of the Police Officer and Prosecutor,* 20 W. St. U. L. Rev. 298, 300 (1993) ("The handling of domestic violence cases in San Diego in early 1986 was similar to most of the country. Police Officers were required to write reports but little else was mandated or encouraged.").

[12] IACP Concept Paper (App. C 13a) ("In the past, law enforcement dispatchers have ignored domestic calls or assigned them low priority.")

protection orders "the opportunity to be heard 'at a meaningful time and in a meaningful manner,'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation removed), then they must offer something more than the "sham" response provided to Respondent. PA 42a.

The Court below held that due process in these circumstances requires the following: an objective, reasoned consideration of the complaint; an assessment of probable cause; a decision; and if adverse, notice to the complainant of the decision and the reasons. PA 40a-42a.[13] These minimal steps appropriately balance the factors that this Court outlined in *Mathews*: (i) the private interest at stake; (ii) the risk of an erroneous deprivation and probable value of additional safeguards; and (iii) the government's interest.

The Private Interest At Stake: The weight of the first *Mathews* factor is overwhelming, and heavily favors at least *some* process. *See Mathews*, 424 U.S. at 340 (calling first factor "crucial" in welfare context where denial "may deprive an eligible recipient of the very means by which to live while he waits"). Protective orders can quite literally save lives, if enforced.[14] NNEDV Br. 26-29. Once enforcement is denied,

[13] The *en banc* court specifically echoed the statutory requirements that officers determine 1) whether a valid order exists and 2) whether probable cause exists to find there is a violation and that the restrained party had valid notice of the order. The *en banc* court then added that if the officer finds that "mandatory" enforcement is not appropriate, the officer must notify the person seeking enforcement of the decision and reasons underlying it. PA 40a. The court emphasized that police consideration must be "bona fide" and the request be "seriously entertained." PA 42a.

[14] "Most women seeking protective orders have experienced physical assault, threats of harm or death, sexual abuse, threats with a weapon, stalking, and harassment, or assaults on their children. Violations of protective orders are both common and often associated with significant danger to the victim. . . . Overlooking the threat posed by protection order violations is unwise and dangerous, [retired Lieutenant Mark Wynn of the

(continued...)

the damage caused to the victim may be permanent -- no amount of retroactive relief will remedy her loss. *See Mathews*, 424 U.S. at 341 (weighing risk that denial "may deprive the eligible recipient of the very means by which to live while he waits").[15]

The Risk of Erroneous Deprivation: This factor requires the Court to assess the extent to which the procedures actually employed by the state risk an erroneous decision. *Id.* Insofar as the Complaint alleges that Petitioner ignored Respondent's repeated pleas for assistance and gave no serious consideration to enforcement of her order, PA 129a (pattern and practice), the risk of error implicit in these non-"procedures" is unquestionably substantial. Indeed, the United States acknowledges that police need to consider information from the holder of a protection order in order to do their job. *See* U.S. Br. 29. Without good faith consideration of that information, error is virtually assured.[16]

Nashville Police Department] believes." National Center for Victims of Crime, *Newsletter of the Stalking Resource Center*, Fall 2004 ("NCVC").

[15] Because time is often of the essence, the United States' suggestion that alternative remedies like contempt can reduce the private interest at stake is misguided. Moreover, the suggestion that police may need to "monitor the situation" has no bearing here, where the police actually failed either to meet Respondent as promised, or even to "monitor" the location where her estranged husband had taken the children. PA 126a-127a.

[16] The United States implies that the outcome here is "exceptional" and the "risk of error" in the "generality of cases" is low. U.S. Br. 28. This suggestion mistakenly treats the "risk of error" factor as measuring the degree of harm rather than the risk of mistakes from existing procedures. It is also unsupportable as a factual matter. Police failures to protect battered women, resulting in murders and attempted murders of mothers and/or children, are legion. *See e.g.*, *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984) ($2.3 million jury award); *Quincy Case*, *supra*. These killings and maimings are *predictable*; indeed, because they are so likely, courts enter protection orders to attempt to stop them.

Probable Value of Additional Safeguards: The procedures adopted by the *en banc* court of appeals are minimal, requiring no more than that which police are ordinarily expected to do in virtually any case: listen, give objective and unbiased consideration to the facts, make a decision about probable cause, and inform the complainant. *See* PA 40-41a. But they are targeted to the precise "nature of the relevant inquiry," giving this *Mathews* factor great weight. *Mathews*, 424 U.S. at 343.

Moreover, contrary to the United States' claim (at 29) that any required procedures would have no value because there are no facts in dispute, the simple process articulated by the Court below would cure the problems presented in this case: By requiring objective and serious consideration of the complaint, it would forestall the "sham" and "cruel deception," PA 42a, that occurred here. By requiring a decision to be made and expressly communicated to the complainant, it would require the police to treat her complaint as a potential crime and to assess probable cause. And by requiring the explanation for a decision against enforcement, it would allow the complainant to correct any misapprehensions and potentially seek supervisory review.[17]

The United States asserts that an informal oral consultation between the police and the caller "would be sufficient and would provide the fundamental requisite of due process of law: the opportunity to be heard." U.S. Br. 29 (punctuation marks and citations omitted). This suggests that

---

[17] In this case the police apparently dismissed Mr. Gonzales's dangerousness, and, if the Petitioner's brief is any indication, may have misread the restraining order. *See* Pet. Br. 2, 7, 7 n.1, 7 n.2 (asserting these events occurred during a "mid-week" dinner visit). This error is contrary to the express allegations of the Complaint. Had the police explained their refusal to assist, Respondent might have been able to correct their mistakes or appeal to a supervisor.

the United States concedes the core process we assert is due. Assuming that the information gathered is actually given good faith, reasoned consideration, and not utterly ignored, we agree that it (along with a probable cause determination and notice to the victim) would be constitutionally sufficient. The core difference here, of course, is a factual one: Respondent alleges that the police ignored her, did not meaningfully consider her complaint, and therefore never even made a probable cause decision. PA 129a.[18]

The Government's Interest: The third *Mathews* factor also weighs strongly in favor of requiring minimal procedures. The state of Colorado has already "voted with its feet," by adopting the mandatory enforcement statute. This decision is utterly rational. Numerous jurisdictions have found that proactive police enforcement dramatically reduces domestic homicides,[19] significantly benefiting both law enforcement

---

[18] The United States argues that this Court should consider the "generality of cases," and that the "usual" process of "informally receiving information" from the complainant is not "inherently faulty." U.S. Br. 29. But the issue before this Court is not whether the "usual process" is faulty, but whether Respondent herself received due process in *this* case. If she did not, the Tenth Circuit was right, and the United States' protestation that "the usual process" is constitutional only serves to undermine its claim that affirmance here would drastically disrupt police operations. Though the United States implies that the "process" in this case met its description of "usual practice," i.e., informal consultation, etc., U.S. Br. 29, the Complaint alleges the opposite.

[19] *Cf.* Hart, *Arrest: What's the Big Deal*, 3 Wm. & Mary J. Women & L. 207, 212-214 (1997) ("The assertion that police intervention equals homicide/crime prevention is now supported by hard numbers") (noting more than 50% drop in homicides due to domestic violence in San Diego; Newport News; Tulsa; Nashville; and Quincy, Mass.); N.C. Gov's Crime Comm'n, Violence Against Women Comm., *Domestic Violence: Best Practices for Law Enforcement Response* iii (1998) <www.gcc.state.nc.us/pubs/dvproto.pdf> ("N.C. Gov's Comm'n") (reporting 59% homicide reduction in San Diego in three years; drop in Tulsa from 16 to one in

(continued...)

and society. *Mathews*, 424 U.S. at 347-48. A proactive police response is in states' interests because it deters future violence and reduces repeat domestic violence calls, thereby reducing the massive costs that future domestic violence incidents would impose.[20] Moreover, a proactive police policy benefits *the police* in numerous ways, such as reducing the drain on police resources by deterring repeat offenders, enhancing police safety, and simplifying and clarifying police obligations.[21]

---

three years; and only one domestic violence related homicide in over 11 years in Quincy).

[20] Wanless, *supra*, at 563 (reduction in domestic violence from proactive police response will produce cost saving to state); *cf.* Br. of *Amici Curiae* Frmr. Colo. Legis. Peggy Kerns, et al., at 12-14 (detailing costs of domestic violence and citing empirical study indicating that prevention and criminal enforcement measures have reduced these costs); Letter from Lt. Healey, San Diego Family Justice Ctr., to Joan Meier (Feb. 7, 2005) ("Healey Letter") (pro-arrest policy reduced repeat calls for service and reduced out-of-service time for officers, by providing more victim assistance, more collaboration with prosecutors and stronger sanctions).

[21] *Cf. e.g.*, Colo. Coalition Against Domestic Violence, *Law Enforcement Training Manual* 2-2 (2d ed. 2003) <www.ccadv.org/publications/law_enforcement_manual_11-03.pdf> ("Colo. Coalition Manual") (one goal is to "[r]educe the demand for police resources by reducing recidivism in domestic violence cases"); Domestic Violence Coordinating Council, *DVCC Model Law Enforcement Domestic Violence Policy* <www.dvcc.state.de.us/1model.html> ("Del. DVCC") (policy seeks to "promote officer safety; deter future incidents of violence, etc."); Ky. Justice Cabinet & Gov's Council on Domestic Violence, *Model Domestic Violence Law Enforcement Policy* <gocadvs.ky.gov/lawpolcy.htm> ("Ky. Gov's Council") ("policy is designed to provide officers and support personnel with clear definitions, direction, and guidelines for providing and promoting a consistent, effective response to domestic violence crime"); *Model Protocol for Police Response to Domestic Violence* 2 (2002) <www.wjin.net/Pubs/2998.pdf> ("Pa. Protocol") (among goals are "[t]o promote officer safety by ensuring that officers are as fully prepared as possible to respond to domestic calls; and ... [t]o help reduce police resources consumed in responding to domestic violence by

(continued...)

The Pennsylvania experience is instructive. There, in the face of a clear message from the courts that its permissive arrest statute did not create an entitlement to procedural due process for deprivation of that benefit, the legislature *responded by enacting a mandatory arrest statute, to ensure that the constitutional entitlement would be established. See Hynson v. City of Chester*, 731 F. Supp. 1236, 1240 (E.D. Pa. 1990) (no entitlement to arrest under original statute); *Coffman*, 739 F. Supp. at 264 (while the PFAA is not mandatory, plaintiff's protection order sufficiently mandated arrest to support Due Process claim); *Burella*, 2003 U.S. Dist. LEXIS 25170 (holding that revised, now mandatory, statute created entitlement). *See* 23 Pa. Cons. Stat. Ann. § 6113(a), (b) (2003) (amended in 1994 to include "shall arrest" language); *see also Taylor v. Ledbetter*, 818 F.2d 791, 800 (11th Cir. 1987) (*en banc*) ("Since the child's claim under *Roth* is a procedural due process claim, the state of Georgia may alter its statutes and ordinances in such a way as to change or eliminate the expectation on which this child had the right to rely."), *cert. denied*, 489 U.S. 1065 (1989).

Petitioner's and its Amici's hyperbolic claims that the *en banc* court's minimal safeguards would "disrupt law enforcement ... by forcing officials to modify enforcement priorities" or to delay their response to "riots or natural disasters," Pet. Br. 39-40; U.S. Br. 23-24, and by requiring "police to devote disproportionate resources" to domestic violence are frankly absurd and bear no relation to the police

---

reducing the number of police interventions required for any particular household"); N.H. Gov's Comm'n on Domestic Violence, *Law Enforcement: A Model for Police Response to Domestic Violence Cases* <doj.nh.gov/victim/pdf /dvlaw.pdf> ("N.H. Gov's Comm'n") ("[t]o increase the effectiveness of police responses to domestic violence incidents thereby reducing the resources consumed by the need to repeatedly respond to the same household"); *Healey Letter*, *supra*.

practices with which we are familiar.[22] Police practices adopted all over the country and championed by leading national law enforcement organizations such as the IACP and the United States Department of Justice require much more of police than the bedrock minima articulated here. For instance, most such guidelines recommend or mandate arrest where there is probable cause to believe a crime has been committed;[23] require police to locate the suspect when he is

---

[22] Despite the government's somewhat alarmist admonition (at 25) that these procedures will wreak havoc with police priorities, rarely will there be "more serious crimes" which should warrant higher priority than this one, in which three children were murdered by their estranged father.

[23] Colo. Spring Police Dep't, *General Order 510: Domestic Disturbances* (2003) ("Colorado Order 510") (App. D 33a) (arrest required for domestic violence crimes); Colo. Coalition Manual, *supra*, § 2-23 (arrest preferred); Del. DVCC, *supra*, at D.1 (arrest mandated for felonies; preferred for misdemeanors); DOJ Off. of Violence Against Women & IACP, *Protecting Victims of Domestic Violence: A Law Enforcement Officer's Guide to Enforcing Orders of Protection Nationwide* (App. E 44a) ("DOJ/IACP Guide") (arrest preferred for crimes or violations of order where required by State); Domestic Violence State Coordinating Council, *Tennessee Domestic Abuse Benchbook* 7 VI.A (1997) <www.tcadsv.org/downloads.html> ("Tenn. Model Policy") (arrest preferred); Exec. Off. of Pub. Safety, *Massachusetts Pol'y for Law Enforcement Response to Domestic Violence* 9-10 (2002) ("Mass. Policy") (mandated for violations of protection orders; preferred where probable cause); IACP Policy (App. B 9a) (strongly recommending arrest when probable cause and requiring explanation for non-arrest); Ky. Gov's Council, *supra* (arrest preferred); Law Enforcement Comm. of the San Diego Domestic Violence Council, *Domestic Violence Law Enforcement Protocol* <www.sandiegodvcouncil.org/sddvc.html> ("San Diego Protocol") (arrest mandated for felonies; preferred for misdemeanor); Malefyt, et al., *Promising Practices: Improving the Crim. Just. Sys. Response to Violence Against Women* 71 (1998) ("Promising Practices") (arrest preferred where probable cause); Malefyt, et al., *Assessing the Just. Sys. Response to Violence Against Women: A Tool for Law Enforcement, Prosecution and the Courts to Use in Developing Effective Responses* 14-36 (1998) ("Malefyt") (describing model police programs in ten cities); *id.* at 10 (arrest expected if probable cause); N.H. Gov's Comm'n, *supra*, at 4 (police should arrest where probable cause exists); Quincy Manual,

(continued...)

absent;[24] and require police to file a detailed investigation report, regardless of whether an arrest is made.[25] Notably, because violators of protection orders present a heightened danger to their victims, and because it is critical to enforce protection orders, those models that address violations of protection orders agree that when non-contact provisions of a protective order are violated, *arrest is required*.[26] Many

---

supra, at 22-24 (arrest mandated for violations of restraining orders; preferred for other domestic violence crimes); N.J. Div. of Crim. Just., *Domestic Violence: Guidelines on Police Response Procs. in Domestic Violence Cases* 3 (1994) <www.state.nj.us/lps/dcj/agguide/dvpolrsp.htm> (must arrest if signs of injury or if no signs of injury but probable cause to arrest); NY. Off. for the Prevention of Domestic Violence, *Model Law Enforcement Pol'y Language* 4-5 (1995) <purl.org/ net/nysl/nysdocs/ 39046885> ("NY Model Policy") (arrest shall be made where allowed by law); N.C. Gov's Comm'n, *supra*, at 4 (police should arrest); *Pa. Protocol*, *supra*, at 1, 6 (police should arrest when possible); Police Chief's Ass'n of Santa Clara County, *Domestic Violence Protocol for Law Enforcement* 13 (2003) <www.growing.com/nonviolent/protocol/ pdfiles/dvp_4law.pdf> ("Santa Clara Protocol") (officer's responsibility to arrest where possible); St. Louis County Sheriff's Office's Safety & Accountability Audit, *Domestic Violence Handbook & Training Guide* (2001) ("St. Louis Sheriff's Audit"); Will Cnty State Atty's Off., *Domestic Violence Protocol* 2 <www.willcountyillinois.com/statesatty/ protocols2.htm> ("Will Cnty Protocol") (officers can make an arrest if probable cause exists); Wisc. DOJ Crime Victims Council, *Model Domestic Violence Policies and Procedures* 5 (2002) < www.doj.state.wi.us/cvs/documents/DAR/ModelDVPolicies.pdf> ("Wisc. DOJ Model Policy") (officer *must* arrest).

[24] Mass. Policy, *supra*, at 10; *Promising Practices*, *supra*, at 12; N.C. Gov's Comm'n, *supra*, at 7; Santa Clara Protocol, *supra*, at 28; St. Louis Sheriff's Audit, *supra*, at 7; Wisc. DOJ Model Policy, *supra*, at 7.

[25] Mass. Policy, *supra*, at 16; Malefyt, *supra*, at 11, 15, 22, 32 (Appleton, Seattle, Virginia Beach Police Dep'ts); Promising Practices, *supra*, 83; Santa Clara Protocol, *supra*, at 15; Will Cnty Protocol, *supra*, at 2.

[26] Colo. Order 510 (App. D 39a); Colorado Spring General Order 612 (App. F 49a); Colo. Coalition Manual, *supra*, at 6-11; Ky. Gov's Council, *supra*, at 5; Mass. Policy, *supra*, at 9-10; N.H. Gov's Comm'n, *supra*, at II.B.; N.Y. Model Policy, *supra*, at VI.D.3; N.C. Gov's Comm'n, *supra*,

(continued...)

policies go even further, requiring, for example, that if no arrest is made, the investigation report must justify that failure;[27] that officers search for the suspect in any location the victim mentions;[28] that police document probable cause determinations;[29] that police *not* consider numerous listed factors in determining probable cause;[30] that officers prepare written reports on any allegation of a violation of a protective order,[31] and that supervisors specifically review investigation reports and probable cause determination.[32]

Thus, while common police protocols require arrest, thorough probable cause assessments, detailed reporting, and follow-up when a suspect is absent, the Tenth Circuit's view of the Due Process Clause requires only reasoned consideration of the complaint, assessment of probable cause, and notice of the decision. The constitutionally sufficient

---

at IV.A; Quincy Manual, *supra*, at 22; San Diego Protocol, *supra*; Tenn. Model Policy, *supra*, at VI.A.3; Santa Clara Protocol, *supra*, at 27; St. Louis Sheriff's Audit, *supra*, at I.A.; NCVC, *supra*, at 2 (due to "danger to victims," police should carefully track violations and consistently arrest violators"); Will Cnty Protocol, *supra*, at 7.B.5. *See also* DOJ/IACP Guide (App. E 46a) (officers should arrest for order violations).

[27] IACP Policy (App. B 8a) ("officers shall fully explain the basis for their non-arrest decision"); Malefyt, *supra*, at 11, 15, 22 (Appleton and Seattle Police Dep'ts); N.C. Gov's Comm'n, *supra*, at 4 (reasons must be "compelling" to justify no arrest); N.H. Gov's Comm'n, *supra*, at 6-7 (same); Pa. Protocol, *supra*, at 1, 6 (requiring "detailed explanation"); Tenn. Model Policy, *supra*, at XII.B; Will Cnty Protocol, *supra*, at 2; Wisc. DOJ Model Policy, *supra*, at 7 (requiring officers to document why no arrest).

[28] N.C. Gov's Comm'n, *supra*, at 7.

[29] Malefyt, *supra*, at 22 (Seattle).

[30] Promising Practices, *supra*, at 73 (Santa Clara & St. Petersburg).

[31] *Id.* at 20 (Santa Clara).

[32] Mass. Policy, *supra*, at 19; Promising Practices, *supra*, at 74; Will Cnty Protocol, *supra*, at 2.

procedures adopted by the *en banc* court are minimal – virtually trivial – in comparison to standard domestic violence police practices. It cannot be that all of these law enforcement organizations are adopting policies that compromise police priorities and their ability to respond to other critical needs. Rather, the procedures adopted below simply require routine police practice to be extended to battered women and their children.[33]

CONCLUSION

For the foregoing reasons, amici request that this Court affirm the decision of the Court of Appeals for the Tenth Circuit and remand this case for further proceedings below.

Respectfully submitted,

JOAN S. MEIER
PROFESSOR OF CLINICAL LAW AND DIRECTOR, DOMESTIC VIOLENCE, LEGAL EMPOWERMENT AND APPEALS PROJECT
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
200 G Street, N.W.
Washington, D.C. 20052
(202) 994-2278

RICHARD W. SMITH
Counsel of Record
FRANCINE A. HOCHBERG
RICHARD L. SLOANE
MCDERMOTT WILL & EMERY LLP
600 13th Street, N.W.
Washington, D.C. 20005
(202) 756-8000

Counsel for Amici Curiae

Dated February 10, 2005

---

[33] "[D]omestic violence . . . disproportionately victimizes women and policies of underenforcement seem clearly motivated by archaic notions of patriarchal family structure and family privacy. . . . At its heart, the attempt to make the law and state actors more responsive to the needs of battered women is about equal protection in the broadest sense." 106 Harv. L. Rev. 1551, 1570 (1993). *See also* NCADV Br. at I. This history and context of discrimination and inequality can and should inform this Court's determination of the procedural due process claim in this case. *See Burson v. Freeman*, 504 U.S. 191, 213 (1992) (considering race discrimination in rejecting First Amendment concerns); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (rejecting states' right to regulate economic activity where it prohibited a boycott "designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself").

APPENDIX A

Colo. Rev. Stat. § 14-10-108 (2004)

(1) In a proceeding for dissolution of marriage, legal separation, the allocation of parental responsibilities, or declaration of invalidity of marriage or a proceeding for disposition of property, maintenance, or support following dissolution of the marriage, either party may move for temporary payment of debts, use of property, maintenance, parental responsibilities, support of a child of the marriage entitled to support, or payment of attorney fees. The motion may be supported by an affidavit setting forth the factual basis for the motion and the amounts requested.

* * * * *

(2) As a part of a motion of such temporary orders or by an independent motion accompanied by an affidavit, either party may request the court to issue a temporary order:

(a) Restraining any party from transferring, encumbering, concealing, or in any way disposing of any property, except in the usual course of business or for the necessities of life, and, if so restrained, requiring him to notify the moving party of any proposed extraordinary expenditures and to account to the court for all extraordinary expenditures made after the order is issued;

(b) Enjoining a party from molesting or disturbing the peace of the other party or of any child;

(c) Excluding a party from the family home or from the home of the other party upon a showing that physical or emotional harm would otherwise result.

* * * * *

Colo. Rev. Stat. § 14-10-109 (2004)

The duties of peace officers enforcing orders issued pursuant to section 14-10-107 or 14-10-108 shall be in accordance with section 18-6-803.5, C.R.S., and any rules adopted by the Colorado supreme court pursuant to said section.

* * * * *

Colo. Rev. Stat. § 18-6-803.5 (2004)

(1) A person commits the crime of violation of a protection order if such person contacts, harasses, injures, intimidates, molests, threatens, or touches any protected person or enters or remains on premises or comes within a specified distance of a protected person or premises or violates any other provision of a protection order to protect the protected person from imminent danger to life or health, and such conduct is prohibited by a protection order, after such person has been personally served with any such order or otherwise has acquired from the court actual knowledge of the contents of any such order.

(1.5) As used in this section:

(a) "Protected person" means the person or persons identified in the protection order as the person or persons for whose benefit the protection order was issued.

(a.5) (I) "Protection order" means any order that prohibits the restrained person from contacting, harassing, injuring, intimidating, molesting, threatening, or touching any protected person, or from entering or remaining on premises, or from coming within a specified distance of a protected person or premises or any other provision to

protect the protected person from imminent danger to life or health, that is issued by a court of this state or a municipal court, and that is issued pursuant to:

* * * * *

(B) Sections 14-4-101 to 14-4-105, C.R.S., section 14-10-107, C.R.S., section 14-10-108, C.R.S., or section 19-3-316, C.R.S., as those sections existed prior to July 1, 2004;

* * * * *

(II) For purposes of this section only, "protection order" includes any order that amends, modifies, supplements, or supersedes the initial protection order. "Protection order" also includes any restraining order entered prior to July 1, 2003, and any foreign protection order as defined in section 13-14-104, C.R.S.

* * * * *

(c) "Restrained person" means the person identified in the order as the person prohibited from doing the specified act or acts.

(2) (a) Violation of a protection order is a class 2 misdemeanor; except that, if the restrained person has previously been convicted of violating this section or a former version of this section or an analogous municipal ordinance, or if the protection order is issued pursuant to section 18-1-1001, the violation is a class 1 misdemeanor.

(a.5) A second or subsequent violation of a protection order is an extraordinary risk crime that is subject to the modified sentencing range specified in section 18-1.3-501 (3).

* * * * *

(3) (a) Whenever a protection order is issued, the protected person shall be provided with a copy of such order. A peace officer shall use every reasonable means to enforce a protection order.

(b) A peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that:

(I) The restrained person has violated or attempted to violate any provision of a protection order; and

(II) The restrained person has been properly served with a copy of the protection order or the restrained person has received actual notice of the existence and substance of such order.

(c) In making the probable cause determination described in paragraph (b) of this subsection (3), a peace officer shall assume that the information received from the registry is accurate. A peace officer shall enforce a valid protection order whether or not there is a record of the protection order in the registry.

APPENDIX B

IACP Model Policy

Effective Date: Revised: October 1, 1996
Subject: Domestic Violence
Special Instructions:
Reevaluation Date: October 1, 1997

I. PURPOSE

It is the purpose of this policy to prescribe preliminary courses of action police officers should take in response to domestic violence incidents.

II. POLICY

This agency maintains that the nature and seriousness of crimes committed between family/household members are not mitigated solely because of the relationships or living arrangements of those involved. It is the policy of this agency that domestic violence be treated with the same consideration as violence in other enforcement contexts and, consistent with this policy, that officers combine the use of appropriate community services with enforcement of the law to (1) break the cycle of domestic violence by preventing future incidents or reducing the frequency and/or seriousness of such incidents, (2) protect victims of domestic violence and provide them with support, and (3) promote officer safety when dealing with domestic abuse situations.

III. DEFINITIONS

Family/household member includes persons who fit into one of the following categories:

1. Are legally married to one another;
2. Were formerly married to one another;
3. Are related by blood;
4. Are related by marriage;
5. Have a child in common;
6. Are living together, who have lived together, or who have a dating relationship; or
7. Are specified as such by state law.

Domestic violence occurs where a family or household member commits or attempts to commit the following types of offenses against another:

1. Bodily injury or threat of imminent bodily injury;
2. Sexual battery;
3. Physical restraint;
4. A property crime directed at the victim;
5. Violation of a court protection order or similar court injunction; or
6. Death.

IV. DISPATCHER'S PROCEDURES

The dispatcher who receives a domestic violence call can provide the responding officers with vital information that could save the victim's and the officer's lives. The dispatcher will give a domestic violence call the same priority as any other life-threatening call and will, whenever possible, dispatch at least two officers to every incident.

A. In addition to information normally gathered, an effort should be made to determine and relay the following to responding officers:

1. Whether the suspect is present and, if not, the suspect's description and possible whereabouts;

2. Whether weapons are involved;
3. Whether anyone has been injured;
4. Whether the offender is under the influence of drugs or alcohol;
5. Whether there are children present;
6. Whether the victim has a current protective or restraining order; and
7. Whether there is a history of domestic violence complaints at that location.

B. Dispatchers shall not cancel police response to a domestic violence complaint based solely on a follow-up call from the residence requesting such cancellation. However, the dispatcher shall advise the officers of the complainant's request.

V. RESPONDING OFFICER PROCEDURES

A. On-Scene Investigation

When responding to a family violence call, the officers shall

1. Physically separate parties involved in domestic violence.
2. Restore order by gaining control of the situation.
3. Take control of all weapons used or threatened to be used in the crime.
4. Assess the need for medical attention and call for medical assistance if indicated.
5. Interview all parties.
6. Collect and record evidence and, where appropriate, take color photographs of injuries and property damage.
7. Complete appropriate crime or incident reports necessary to fully document the officer's

response, whether or not a crime was committed or an arrest made.

8. Give the victim a copy of the incident report number.
9. If the offender has left the scene and a crime has been committed, the officers will do the following:

   a. Search the immediate area if potentially worthwhile;
   b. Obtain information from victims and witnesses as to where the offender might be;
   c. Seek an arrest warrant, and
   d. Refer the matter to the investigative unit.

B. Arrest

1. Officers should make an arrest when probable cause and legal authority exist to do so. Field release and issuance of a citation are not permitted in domestic violence cases when grounds for an arrest are present.
2. If an arrest is not made where probable cause exists, officers shall fully explain the basis for their non-arrest decision.
3. The officers should emphasize to the victim and the offender that the criminal action is being initiated by the state and not the victim.

C. Victim Assistance/Crime Prevention

Many victims of domestic violence feel trapped in violent relationships because they are unaware that domestic violence is a crime or that resources are available to help them. Also, the offenders may have

threatened further violence if the victim attempts to leave or seek assistance. Therefore, officers are required to provide the following assistance to victims, batterers, and, where appropriate, the children of these individuals:

1. Advise all parties about the criminal nature of family violence, its potential for escalation, and that help is available;
2. Secure medical treatment for victims;
3. Ensure the safety of the children;
4. Remain on the scene until satisfied that there is no threat to the victim;
5. Remain on the scene to preserve the peace if one person needs to remove personal (not joint) property;
6. Provide the victim with a referral information packet for legal or social assistance and support;
7. Where necessary, transport the victim to an available shelter or suitable alternative safe haven; and
8. If children need to be removed from the home, contact a supervisor.

This project was supported by Grant No. 93-DD-CX-K009 awarded by the Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice. The Assistant Attorney General, Office of Justice Programs, coordinates the activities of the following program offices and bureaus: the Bureau of Justice Assistance, the Bureau of Justice Statistics, National Institute of Justice, Office of Juvenile Justice and Delinquency Prevention, and the Office of Victims of Crime. Points of view or opinions in this document are those of the author and do not represent the official position or policies of the United States Department

of Justice or the International Association of Chiefs of Police.

Every effort has been made by the IACP National Law Enforcement Policy Center staff and advisory board to ensure that this model policy incorporates the most current information and contemporary professional judgment on this issue. However, law enforcement administrators should be cautioned that no "model" policy can meet all the needs of any given law enforcement agency. Each law enforcement agency operates in a unique environment of federal court rulings, state laws, local ordinances, regulations, judicial and administrative decisions and collective bargaining agreements that must be considered. In addition, the formulation of specific agency policies must take into account local political and community perspectives and customs, prerogatives and demands; often divergent law enforcement strategies and philosophies; and the impact of varied agency resource capabilities, among other factors.

APPENDIX C

IACP National Law Enforcement Policy Center

Domestic Violence

Concepts and Issues Paper

Originally Published: August 1, 1990
Revised: October 1, 1996

I. INTRODUCTION

A. Purpose of Document

This paper was designed to accompany the Model Policy on Domestic Violence established by the IACP National Law Enforcement Policy Center. This paper provides essential background material and supporting documentation to provide greater understanding of the developmental philosophy and implementation requirements for the model policy. This material will be of value to law enforcement executives in their efforts to tailor the model to the requirements and circumstances of their community and their law enforcement agency.

B. Definitions

The legal definitions of family or household members differ somewhat from state to state. The model policy includes in its definition persons who are or were married; are related by blood or marriage; have a child in common; are living together or have lived together; or have a dating relationship, whether that be heterosexual or homosexual in nature.

The term family violence generally includes violent behaviors against children, spouses, parents, or other current

or former household members. The term domestic violence in this paper is used interchangeably with the terms wife beating, battering, and spouse abuse, but these terms also apply to other than legally married couples. Violence between ex-spouses or others with present or past intimate relationships can be considered in the same category. It is widely recognized that while some husbands are abused, the vast majority of domestic violence victims are women.

The model policy states that domestic violence "occurs where a family or household member commits or attempts to commit the following types of offenses against another:

1. Bodily injury or fear of imminent bodily injury;
2. Sexual assault;
3. Interference with freedom of movement;
4. A property crime directed at the victim;
5. Violation of a court order; or
6. Criminal trespass."

Thus, domestic violence cases may include but are not limited to the crimes of homicide, rape, assault, battery, reckless endangerment, burglary, criminal trespass, malicious mischief, kidnapping, unlawful imprisonment, and others.

II. BACKGROUND

A. From Private Matter to Crime

By the turn of the 20th century, most states had outlawed wife beating.[1] Nevertheless, Americans have been reluctant to give up the view that family matters, including violence, should be resolved by family members, not public agencies.

[1]Del Martin, *Battered Wives*, New York, Simon and Schuster, Inc., 1976.

Many victims[2] as well as police have shared this view. In the past, law enforcement dispatchers have ignored domestic calls or assigned them low priority.[3] 0fficers have failed to make arrests even when serious injuries were inflicted,[4] and have treated as misdemeanors many assaults involving extensive physical harm and weapons.[5]

With greater public understanding of domestic violence in the 1970s came increased pressure on law enforcement to intervene. Policies changed, and officer responsibilities became more extensive. However, policies were still not focused on arresting lawbreakers. Rather, officers were instructed to restore order, separate and calm down the involved parties, and sometimes send the suspect away to "cool off." Some officers also attempted to mediate the situation and made referrals to social service agencies.[6] But batterers were seldom arrested and tried in criminal court for assault or other crimes.

[2]Patrick A. Langan and Christopher A. Innes, *Preventing Domestic Violence Against Women*, Bureau of Justice Statistics, Special Report, August 1986. According to the National Crime Survey for 1978-82, 49 percent of women who did not report domestic violence incidents to the police claimed they did not call because they considered the incident a private matter.

[3]Michael Steinman, "Anticipating Rank and File Police Reactions to Arrest Policies Regarding Spouse Abuse," *Criminal Justice Research Bulletin*, Vol. 4, No. 3, 1988, p. 1. Also see Eva S. Buzawa, "Police Officer Response to Domestic Violence Legislation in Michigan," *Journal of Police Science and Administration*, December 1982, p. 415.

[4]*Ibid.*

[5]Barbara E. Smith, *Non-Stranger Violence: The Criminal Court's Response*, Washington, D.C., National Institute of Justice, 1983, p. 89.

[6]Morton Bard, *Training Police as Specialists in Family Crisis Intervention*, Washington, D.C., Government Printing Office, 1970.

Only in the past decade has there been widespread public insistence that violent incidents in the home be treated as crimes. The model policy reflects this view in the first sentence:

> *The nature and seriousness of crimes committed between family or household members are not mitigated because of the relationships or living arrangements of those involved.*

In short, domestic violence can no longer hide behind soft language. It is not a "quarrel," "spat," or "dispute." It involves crimes that demand a law enforcement response, including arrest where probable cause and legal authority exist.

B. Factors Influencing Policy Changes

Four main factors have caused law enforcement agencies throughout the country to change their policies and require arrests in domestic violence cases: persistent lobbying and information campaigns by battered women and their advocates; changes in state laws; research conducted in cooperation with law enforcement agencies; and court decisions determining police liability for failure to protect domestic violence victims.

In the mid-1970s, battered women collaborated with researchers and other professionals to expose the extent and nature of domestic violence.[7] It became evident there was a critical need to protect and develop services for battered

[7]Erin Pizzey, *Scream Quietly or the Neighbors Will Hear*, Short Hills, New Jersey: Ridley Enslow, 1977 (published in England in 1974); Del Martin, *Battered Wives*, New York: Simon and Schuster, Inc., 1976 (updated in 1983); and Lenore Walker, *The Battered Woman*, New York: Harper and Row, 1979.

women. Many communities established emergency shelters or networks of safe houses, along with programs to provide counseling, legal advice, financial planning services, and in some jurisdictions, counseling for batterers.

Until recently, officers in most states did not have the legal authority to make misdemeanor arrests in domestic situations unless they witnessed the crime. Since many initial acts of domestic violence are misdemeanor assaults, opportunities to prevent future, and probably more violent, incidents were limited. Coalitions of service providers and former victims began to press hard for changes in the criminal justice system's response to spouse abuse. They insisted that state laws and police policies emphasize the need to arrest suspects in domestic violence cases. Now, the majority of states permit police to make arrests for simple assault in domestic cases based on probable cause, without having to witness the incident.

In the early 1980s, the results of research in the Minneapolis, Minnesota, Police Department also supported the adoption of policies requiring or encouraging arrests. The research design of the Minneapolis Domestic Violence Experiment applied only to misdemeanor domestic assaults. The police had been recently empowered by state law to make arrests in these cases, although they were not required to do so. For the experiment, a lottery selection determined which of three responses police officers would use for each incident: arrest the suspect; send the suspect from the scene for eight hours; or provide some form of advice, which could include mediation.

The study found that, according to the victims, only 19 percent of the suspects who were arrested repeated the violence within the next six months, compared to 37 percent

of those who received advice, and 33 percent of those who were separated.[8]

The researchers also reported a number of flaws in the experimental design and its implementations and encouraged replication of the experiment in other cities.[9] However, they were confident enough in the results to state that "the preponderance of evidence in the Minneapolis study strongly suggests that the police should use arrest in most domestic violence cases."[10] By 1986, nearly half of police departments in cities with more than 100,000 residents had policies prescribing the arrest of domestic violence suspects, compared to only 10 percent in 1984.[11]

In the late 1980s, replications of the Minneapolis experiment were undertaken in six cities.[12] While the full data from one site was never made public, the findings from these replication experiments differ from those in Minneapolis. The Omaha researchers concluded that

---

[8]Lawrence W. Sherman and Richard A. Berk, *The Minneapolis Domestic Violence Experiment*, Washington, D.C., Police Foundation Reports, April 1984, p.6.

[9]Sherman and Berk, "The Specific Deterrent Effects of Arrest for Domestic Assault," *American Sociological Review,* Vol. 49, No.2, April 1984.

[10]Sherman and Berk, *Police Foundation Reports, op. cit.*, p.2.

[11]E.G. Cohn and Lawrence W. Sherman, "Police Policy on Domestic Violence, 1986" paper presented to annual meeting of the Academy of Criminal Justice Sciences, St. Louis, Missouri, 1987.

[12]The replications, sponsored by the National Institute of Justice, were undertaken in Omaha, Nebraska; Atlanta, Georgia; Milwaukee, Wisconsin; Colorado Springs, Colorado; Charlotte, North Carolina; and Dade County, Florida.

arresting suspects had no more effect on deterring future conflict than did separating or counseling them.[13]

Differences in various conditions in Minneapolis and Omaha (and the other replication sites) will need further consideration. For example, all arrested suspects in Minneapolis spent at least eight hours in jail. In Omaha, some suspects spent less than eight hours from booking to the posting of bond.

It is also important to note that in Omaha, although arrest by itself did not deter continued conflict, neither were the victims whose spouses were arrested in any greater danger of continued violence.[14] This finding supports the concept that laws and policies favoring arrest are not likely to encourage further victim harm, and at the same time make a strong public statement about society's unwillingness to tolerate domestic crimes.

However, since arrest alone may not deter continued domestic violence, researchers and policy makers must consider which additional strategies are most effective. As discussed later, the model policy includes procedures for providing victims with protection, referral sources, and information.

Several significant court cases have also influenced law enforcement to adopt arrest policies. In 1985, a federal jury awarded Tracy Thurman $2.3 million and found that the city of Torrington, Connecticut, and 24 of its police officers violated Mrs. Thurman's 14th Amendment right to equal

---

[13]Franklyn W. Dunford, David Huizinga and Delbert S. Elliott, "The Role of Arrest in Domestic Assault: The Omaha Police Experiment," *Criminology, Vol.28, No.2, May 1990, p. 204.*

[14]Dunford, et. al., p.204.

protection.[15] For eight months, Mrs. Thurman had notified the police repeatedly of her husband's threats on her life. She attempted unsuccessfully to file complaints against him. After one assault, he was convicted of a breach of the peace, and she obtained a protective order. Still, the police failed to arrest him after promising several times to do so. Finally, Mr. Thurman brutally stabbed her.

The court held that the police based a policy of not arresting abusive men on an impermissible stereotype that husbands may beat their wives. The court stated that

> *[a] man is not allowed to physically abuse or endanger a woman merely because he is her husband. Concomitantly, a police officer may not knowingly refrain from interference in such violence, and may not automatically decline to make an arrest simply because the assault and his victim are married to each other. Such inaction on the part of the officer is a denial of the equal protection of the laws.*[16]

Other courts have ruled that the police may be held liable for failure to protect if a "special relationship" has been taken on by the police department or imposed by statute. Josephine Sorichetti was separated from her husband, Frank, and had obtained a protective order forbidding him to assault, menace, or endanger her. When she brought their daughter to him for a weekend visit, he made threats on both their lives, which Mrs. Sorichetti reported to the police. When he failed to return their daughter, Mrs. Sorichetti called the police, but was told to wait. Meanwhile, Mr. Sorichetti stabbed his daughter with a screwdriver, fork, and

[15] *Thurman* v. *City of Torrington*, 595 F. Supp 1521 (1984).
[16] *Id.* at 1528.

knife, and tried to saw off her leg. He was later convicted of attempted murder.

The New York Court of Appeals in Sorichetti v. New York[17] said a municipality cannot be held liable for failure to provide adequate protection absent a special relationship, but that such a special relationship existed in this case because of

> *(1) the order of protection, (2) the police department's knowledge of Frank Sorichetti's violent history, gained through and verified both by its actual dealings with him, the existence of the order of protection and its knowledge of the specific situation in which the infant had been placed; (3) its response to Josephine Sorichetti's pleas for assistance on the day of the assault, and (4) Mrs. Sorichetti's reasonable expectation of police protection.*[18]

In *Bruno* v. *Codd*[19], 12 battered women brought an action against the New York City Police Department for failure to respond to requests for protection, "presumably because of reluctance on the part of the police to intervene in what they reflexively characterized as 'domestic disputes' rather than criminal offenses."[20] A consent judgment was negotiated, resulting in major revisions in the department's policy. The police agreed thereafter to arrest the husband whenever there was reasonable cause to believe a felony had been committed against the wife or a protective order had been violated; remain at the scene to prevent other offenses; and provide the wife other assistance. Further, police supervisors revised

[17] *Sorichetti* v. *City of New York*, 492 N.Y.S. 2s 59 (Ct. App. 1985).
[18] *Id.* at 59
[19] *Bruno* v. *Codd*, 419 N.Y.S.2d 901 (1979).
[20] *Id.* at 905.

their disciplinary and other regulations to ensure these policies were carried out.

C. Dispelling Myths and Stereotypes

There should no longer be any doubt that spouse abuse occurs frequently in our society. Further, the injuries sustained are serious. According to National Crime Survey (NCS) data for 1978 to 1982, each year about 2.1 million women were victims of domestic violence. On average, the women were victimized three times each. Nearly half of these estimated 3.4 million incidents were not brought to the attention of the police.[21] According to the Bureau of Justice Statistics, about a third of the incidents in the NCS survey would be classified as felonies (aggravated assault, rape, robbery). The remaining two-thirds would be considered "simple assaults." However, the data suggest that about half of the simple-assault victims sustain injuries that are far more serious than commonly believed.[22]

Further, the severity of the violence in a family is likely to escalate over time. One study found that in Kansas City, in 85 percent of the domestic homicides, the police had been to the home at least once before the murder. In 50 percent of the cases, they had been there at least five times.[23]

One common misconception has been that domestic violence is predominantly a problem among the poor. Poor victims do account for more reported domestic violence. However, many experts believe this is simply because they cannot afford private counseling and other resources

[21] Langan and Innes, p.1.
[22] *Ibid.*
[23] Police Foundation, *Domestic Violence and the Police: Studies in Detroit and Kansas City,* Washington, DC, 1977.

available to middle- and upper-income persons.[24] Nor is domestic violence a "blue-collar" problem. Batterers include doctors, lawyers, business executives, government officials, police officers, and clergymen, all occupations. Similarly, no assumptions about battering should be based on racial or ethnic stereotypes.

In fact, it is not possible to construct a profile of a batterer that would be of any immediate value to a responding officer. Some, but certainly not all, abusers have alcohol or drug problems, but treatment for addiction alone is no guarantee that the abusiveness will stop.[25] Very few batterers are psychotic. Some suspects may appear angry and disheveled when the officer arrives, but in other situations, the man behaves calmly while the woman seems hysterical, leading officers to assume incorrectly that the reported abuse or possibility of future danger have been exaggerated.

Nevertheless, batterers do have common characteristics that are important to understand if we are to stop blaming the victim for the violence. Batterers are likely to deny or minimize their behaviors. They often blame others for their problems or abusiveness (Ashe drove me to it@). They tend to be jealous and possessive; in the extreme, they may constantly follow their spouses around and closely monitor their activities. In addition to inflicting repeated physical harm on their spouses, they exhibit "a cohesive pattern of coercive controls that include verbal abuse, threats, psychological manipulation, sexual coercion and control over economic resources."[26] This pattern also includes

[24] Gail A. Goolkasian, *Confronting Domestic Violence: A Guide for Criminal Justice Agencies,* National Institute of Justice, May 1986, p.3.
[25] David Adams, "Identifying the Assaultive Husband in Court: You Be the Judge," *Response*, Vol. 13, No.1, 1990, p.15.
[26] Adams, p.14.

periods of remorse and loving behavior, giving some victims hope that the abuser will change.

Law enforcement training on spouse abuse often includes descriptions of this "cycle of violence," in which relatively calm periods are followed by still more, and often more devastating, assaults. It is also important to stress that financial dependence on the abuser, religious beliefs, and cultural pressures to keep the family intact are all factors that influence the victim to stay. She may also be unaware of the social support systems and legal remedies available to her.

The result for the victim can be an immobilizing fear. Police often express frustration about the victim's reluctance to press charges against the abuser. Yet, in many ways the victim's experience can be compared to that of a hostage or prisoner of war.[27] She is attacked verbally, beaten, isolated from friends and family, and threatened with more severe beatings should she try to escape or call for help. To help reduce the possibility of the suspect's retaliating against the victim, the model policy requires the arresting officer to emphasize that the criminal action is being initiated by the state and not the victim.

III. POLICY AND MANAGEMENT ISSUES

A. Officer Compliance and Training

Historically, officers have valued the freedom to use their discretion on duty. Although some jurisdictions report high officer compliance once domestic violence arrest policies are in place, some resistance to a mandatory policy should be

[27]Gail A. Goolkasian, "Confronting Domestic Violence: The Role of Criminal Court judges," Washington, DC, National Institute of Justice, *Research in Brief*, November 1986, p.2.

anticipated. Even the Minneapolis experiment ran into difficulties because of officers' reluctance to use the proscribed responses. Early indications are that the departments with greatest compliance are those operating in an arena where system-wide support is in place (prosecutors, courts, treatment services, and others). Law enforcement administrators must determine how they will get officers to arrest all or most suspects, and provide for the training and support needed to make quality arrests that succeed in accomplishing overall goals.[28]

A "preferred" rather than "mandatory" arrest policy may pose a lesser threat to officer discretion. However, since arresting suspects calls for using traditional tactics, officers may more readily accept a mandatory arrest policy than an experimental approach.[29] Further, it may provide the specific guidance that officers appear to be seeking for handling domestic calls.[30]

Also arguing in favor of a mandatory policy are increasing community expectations that police will treat spouse abuse as seriously as any stranger-to-stranger crime. Failure to do so risks not only court action but a more general loss of agency credibility in the community. Domestic violence victims clearly have high expectations of the police. On the National Crime Survey, the most common reasons given for reporting a domestic crime were to keep it

[28]Steinman, p.2.

[29]Steinman, p.4.

[30]Ronald Dolon, James Hendricks and M. Steven Meagher, "Police Practices and Attitudes Toward Domestic Violence," *Journal of Police Science and Administration*, Vol.14.,No.3, 1986, pp. 192-197.

from happening again (37 percent) and to "prevent this incident from happening" (24 percent).[31]

In general, the department must assess and deal with existing officer skills and attitudes when it designs training to support domestic violence policies. Do officers still view wife beating as a private matter? Have they been exposed to crisis intervention training? Will they have reasonable assurance that the rest of the criminal justice system will back them up after an arrest is made?

Many experts note that how arrests are made may be as important as whether they are made. In the Minneapolis experiment, victims' feelings that the police listened to them were more closely associated with reducing rearrest than the offender's background and many other variables.[32] Officers need to be aware of the subtle ways their language can affect outcomes.[33] Does the officer imply to the victim or suspect that these cases seldom go anywhere? Or are victims and suspects, as the model policy requires, being fully informed of the criminal nature of the act and the legal remedies available?

The fact that law enforcement officers may have personal experience in domestic violence, either as an abuser or the victim of domestic abuse, should not be overlooked. Such experience will almost certainly affect their views regarding domestic violence enforcement. Law enforcement agencies should be cognizant of this fact and be prepared to offer

---

[31] Langan and Innes, p.3.

[32] Sherman and Berk, *Police Foundation Reports, op. cit.*, p.6.

[33] Gail A. Goolkasian, *Confronting Domestic Violence: A Guide for Criminal Justice Agencies,* Washington, DC, National Institute of Justice, May 1986, p.24.

intervention strategies for affected employees, or disciplinary or criminal sanctions where appropriate.

B. Officer Safety

One of the three main elements of the model policy relates to promoting officer safety. Officers should be "fully prepared to respond to and effectively deal with domestic violence calls for service."

In the past, the risk of officer death in responding to domestic calls has been overstated. This is largely because of the way the FBI grouped the "disturbance calls" data in its annual report on officers killed and assaulted. Until 1982, the "disturbance" category included bar fights, general disturbances, and citizens brandishing firearms, in addition to domestic situations. When domestic calls were separated from other disturbances, the data on officer deaths from 1973 through 1984 revealed 69 deaths associated with domestic disturbances, compared to 151 for other disturbances. During the same period, 210 deaths were associated with robberies, 162 with traffic situations, and 75 with burglaries; and 65 officers died accidentally because of their own actions or the actions of other officers.[34]

Of course, this does not mean that domestic calls are not dangerous, since assaults and injuries are always a possibility. But training in handling domestic calls should put the risks in proper perspective. The model policy states that dispatchers should give domestic violence calls the same priority as other life-threatening calls, and recommends sending at least two officers to every incident.

---

[34] Joel Garner and Elizabeth Clemmer, "Danger to Police in Domestic Disturbances-A New Look," National Institute of Justice, *Research in Brief*, November 1986.

C. Victim Assistance and Crime Prevention

Preventing future violent incidents is clearly one of the goals of victims who report domestic crimes, and is one of the main purposes of the model policy. The policy combines its recommendations on arrest with several specific "victim assistance/crime prevention" measures. These include steps to meet safety and medical needs and to preserve the peace. In addition, the policy calls for advising the parties of the criminal nature of domestic violence and its potential for escalation, and requires provision of legal and social service referrals. Many departments rely primarily on the responding officers to provide these initial advisory and referral services. The officers' training, expertise, and attitudes will be important factors in providing effective responses.

Some departments have teamed with social service and mental health providers to take an outreach approach. For example, the Bellevue, Washington, Police Department notes that it "is not sufficient to merely refer (domestic violence victims) to make a self-initiated call; most often, they simply will not do it." The department requires officers to report every case, regardless of whether there is cause for arrest, and code it "DV." The report is sent to a local social service agency for prompt follow-up, which includes contacting the victim about available services and safe houses.[35]

Similarly, in New York City the police department works with the Victim Services Agency to provide telephone follow-up on domestic incidents. Where multiple incidents have been reported, unannounced home visits are made. In Phoenix, mental health professionals and trained volunteers form two-person family stress teams to assist officers. The

[35]D.P. Van Blaricom, "Domestic Violence," *Police Chief,* June 1985, p.64.

teams use a radio-equipped, unmarked car during the busiest weekend hours and provide on-site crisis intervention and counseling at the officer's request.[36]

D. Reporting Requirements

The model policy includes the requirement that officers "complete appropriate crime or incident reports . . . whether or not a crime was committed or an arrest made." Clearly, outreach efforts like those noted above would not be possible without conscientious reporting.

There are other benefits to recording all incidents and identifying them properly as domestic cases. Accurate statistics can enable the police to describe the extent of the problem and help gain support for needed resources. These records can also improve officer preparation and safety. For example, in Albuquerque, information on civil and criminal domestic violations are available to field units through the department's computer-aided dispatch system. Officers can obtain information on past problems at a specific address as they proceed to answer a call.

IV. CONCLUSIONS

In 1984, the Attorney General's Task Force on Family Violence concluded that the "legal response to family violence must be guided by the nature of the abusive act, not the relationship between the victim and the abuser."[37] The model policy supports this view. Acts of domestic violence are crimes. Law enforcement officers should make arrests

[36]Maryann Conrad and Thomas M. Jahn, "The Family Stress Team Approach in Curbin Domestic Violence," *Police Chief*, June 1985, p. 67.
[37]Attorney General's Task Force on Family Violence, *Final Report*, Washington, D.C., U.S. Department of Justice, 1984, p.4.

whenever probable cause and legal authority exist. Support for this view is widespread, based on the experience of advocates for battered women, current social science research, changes in state laws, and the courts.

Nevertheless, the model policy also recognizes that arrests alone may not deter future acts of violence. It recommends additional measures to provide victims with information and protection and encourages referrals for needed services. Arrest is viewed as only one tool in an officer's "tool bag" of possible responses to instances of domestic violence.

Among those who advocate a comprehensive approach to addressing domestic violence is Dr. Lawrence Sherman, lead researcher for the original domestic violence experiments in Minneapolis and a recognized expert on the subject. In an exhaustive assessment of the research to date,[38] including the

---

[38] Lawrence Sherman, *Policing Domestic Violence: Experiments and Dilemmas*, New York: The Free Press, 1992.

This project was supported by Grant No. 95-DD-BX-K014 awarded by the Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice. The Assistant Attorney General, Office of Justice Programs, coordinates the activities of the following program offices and bureaus: the Bureau of Justice Assistance, the Bureau of Justice Statistics, National Institute of Justice, Office of Juvenile Justice and Delinquency Prevention, and the Office of Victims of Crime. Points of view or opinions in this document are those of the author and do not represent the official position or policies of the United States Department of Justice.

Every effort has been made by the IACP National Law Enforcement Policy Center staff and advisory board to ensure that this model policy incorporates the most current information and contemporary professional judgment on this issue. However, law enforcement administrators should be cautioned that no "model" policy can meet all the needs of any given law enforcement agency. Each law enforcement agency operates in a unique environment of federal court rulings, state laws, local ordinances, regulations, judicial and administrative decisions and collective

(continued...)

available findings of the six replication experiments previously mentioned, Dr. Sherman draws several conclusions and recommendations that deserve attention here.

First, of the six cities in the replication study, only Omaha issued warrants to offenders who were not present when officers arrived, and this was the only effective innovation among the cities involved in the experiment. Those served with warrants had less than half the repeat violence of those who did not. This finding is largely the basis for the model policy's recommendation that arrest warrants be issued for offenders who have fled the scene of actionable domestic violence prior to police arrival.

Notwithstanding the foregoing, the results of domestic violence research generally and the replication experiments in particular show that the impact of arrest varies by jurisdiction due primarily to differences in population composition. For example, analysis of the data suggests that unemployed suspects become more violent if arrested, but that employed suspects do not. According to Sherman, this consistent pattern found among the cities in the replication experiments supports the position that criminal punishment depends largely upon a suspect's "stake in conformity" that is, how much he has to lose from the social consequences of his arrest. Unemployed and unmarried individuals experience the greatest escalation in violence after arrest, a

---

bargaining agreements that must be considered. In addition, the formulation of specific agency policies must take into account local political and community perspectives and customs, prerogatives and demands; often divergent law enforcement strategies and philosophies; and the impact of varied agency resource capabilities among other factors.

pattern that was the most consistent finding among the domestic violence replication experiments, while those with jobs and families may be more responsive to arrest or the threat of arrest. Arrest is also only a deterrent in cases where it is perceived as "legitimate." The values of a subculture of the community and the neighborhood social context (e.g. saving face in front of peers by defying authority and the arrest) are factors that mitigate the perceived legitimacy of arrests for domestic violence. In fact, subcultural values may in some cases even support or condone the use of violence within the family as an acceptable means of dealing with problems. As such, the capacity of arrest to change the behavior of domestic violence perpetrators is substantially diminished or even counterproductive.

Unfortunately, these findings create a dilemma for police and their governing jurisdictions that mandate arrest in all domestic violence cases. On the one hand, mandatory arrest policies and laws may help protect working-class women, but on the other hand they may also cause greater harm than would otherwise be the case for many of the poor and disenfranchised within those same jurisdictions. In many cases, those individuals who are the most frequent offenders (and the most deserving of arrest in the minds of many) are the individuals who are often least responsive to arrest as a punishment or deterrent.

The impact of arrest is also uncertain in other ways. Three-hour arrests in Milwaukee reduced the immediate danger to spouses, but over the course of a year, violence increased among the same suspects who were arrested. The question becomes in many situations whether to risk additional violence in the short run by not making an arrest or to risk more danger of violence later if an arrest is made.

In the wake of these and other dilemmas and unsure outcomes, Sherman makes several salient points. First, he recommends that states repeal mandatory arrest laws and replace them with arrest as an option for police officers. Arrest is not appropriate for all persons and may even be counter-productive in many cases, as has been noted. Arrest should be regarded as only one tactic that is available to police in dealing with domestic violence. A policy that encourages arrest where probable cause exists is probably more appropriate, and officers should be given reasonable discretion in these situations to use other remedies. At the same time, for purposes of supervision, officers should also be required to justify their decisions if they do not arrest in situations where probable cause to arrest exists.

Second, instead of mandatory arrest, Sherman recommends that each police agency develop its own list of approved options that officers may use at their discretion in accordance with policy and training. The IACP National Law Enforcement Policy Center has long maintained that policy must meet the particular circumstances of police agencies and their communities. The highly diverse nature of communities within states and regions makes it essential that police agencies tailor their domestic violence and other policies to match the needs and capabilities of their jurisdictions. Along with this discretion, however, agencies must provide training for officers that examines the nature and causes of domestic violence and the various options and community resources that may be brought to bear on such problems along with the potential impact of those options.

Third, special units and policies should focus on chronically violent couples. A limited number of couples and addresses produce the vast majority of domestic violence complaints. In Minneapolis, for example, over half of the domestic violence calls for service originated from just 3

percent of locations in the city. Identifying and targeting both offenders and locations are important steps in managing the police response to domestic violence. The use of specially trained personnel may be one approach to dealing with targeted locations and offenders.

Finally, until recently most police agencies have responded to domestic violence as individual incidents rather than identifying, analyzing, and systematically addressing problem patterns in targeted locations. The implications for managing police resources and developing response options and prevention strategies through overall problem solving and community-oriented policing styles appear obvious, but is beyond the scope of this document to explore. Given the immense law enforcement and social problem created by domestic violence and our seeming inability to make meaningful progress toward its control, police agencies should be encouraged to pursue controlled experimentation rather than become entrenched in a single-minded focus on arrest as the only useful response.

APPENDIX D

Colorado Spring Police Department, *General Order 510: Domestic Disturbances* (2003).

Colorado Spring Police Department
General Order 510
Section 5: Special Populations
Domestic Disturbances

Active date: **11/13/2003**
Supersedes date: **9/24/2002**

* * * * *

.03 Discussion

Domestic disturbance calls for service are serious matters requiring appropriate handling by police officers, particularly when there is probable cause that crimes against persons have been committed. Failure to take the appropriate action often leads to later personal crimes involving the same parties and to repeated calls for police service. State statute requires that peace officers arrest any suspect when probable cause exists that an offense involving domestic violence has been committed.

.04 Policy

In domestic disturbance calls, when probable cause is present for crimes relating to domestic violence, officers shall arrest the suspect. The overriding concern is taking appropriate action that assures the protection and safety of the victim and other potential victims. When probable cause is present, the officer will arrest the suspect regardless of the expressed wishes of the victim, and whether or not the victim agrees to

sign a complaint. All persons arrested for offenses related to Domestic Violence, both felony and misdemeanor, will be booked into secure detention and required to post bond on the charges.

* * * * *

.10 Arrest of Domestic Violence Assailants

If the officer finds probable cause that a crime has been committed, within the definition of domestic violence, suspect and victim are or have been involved in an intimate relationship, the officer shall arrest the suspect without undue delay. All persons arrested on offenses relating to Domestic Violence, including felonies, misdemeanors, and City ordinance violations, will be booked into secure detention, CJC or Spring Creek, as appropriate, and required to post bond.

When visible injuries are present, officers are required to document them with photographs, whenever possible. Any other evidence shall be collected to the degree it is reasonably possible, and preserved in accordance with existing policy.

All Domestic Violence initial investigations and arrests will be documented on a Domestic Violence (DV) Form, as follows:

- If possible, the officer will obtain the victim's signature on the "complaining witness" line on the face of the Domestic Violence Form. The refusal of a victim to sign the complaint does not eliminate the requirement that the suspect be arrested if probable cause is established.

- The victim will be asked to complete and sign a written Victim's Statement, as well as the face of the form, but shall not be required to do so. The fact that a victim declines to sign a complaint, or complete a statement, does not alter the obligations of the officer to make an arrest, based on probable cause. In the event the victim does not complete a written statement, probable cause for the arrest must be clearly established in the investigating officer's written statement.

- If the victim is transported to the hospital or indicates that he/she will seek medical attention, the "Authorization to Release Medical Information to the District Attorney/Law Enforcement" form shall be signed, by the victim, and forwarded to the appropriate Investigations unit. On older DV packets, this release is a signature line on the back of the last page.

- The victim of domestic violence shall be advised that he/she has the right to be notified when the suspect is released from jail. If the victim requests notification, the officer shall obtain the victim's signature on the "Victim Notification" line, located on the back of the last page.

- Officers will provide the victim with the blue Victim Copy of the DV packet, incidental to their initial on-scene investigation, whether or not a suspect has been arrested or a pickup placed for a suspect at large. The original Victim Copy should not be returned to CSPD files, nor should it be left with the original DV packet when a pickup is placed.

Misdemeanor Arrest--If the officer finds probable cause that a misdemeanor crime has been committed, within the definition of domestic violence, the officer shall complete a DV Form Summons and Complaint as follows:

- Charges shall be written into County Court rather than Municipal Court, unless the only violation for which probable cause exists is a Municipal Code violation having no corresponding State charge.

- The officer will write "Post Bond" in the defendant's signature block of the DV Summons & Complaint. When an arrest is made, the defendant's copy will be left with booking personnel when the suspect is booked into CJC or Spring Creek. If the form being used still contains a Personal Recognizance Bond and No Contact Order section, the officer will draw a line through the entire section and will not otherwise use it.

- When officers making a misdemeanor DV arrest determine that during the same criminal episode the suspect has committed non-DV misdemeanor offenses, against other victims with whom they have no intimate relationship, the charges should be written on separate summonses, having the same court date and cross referenced to each other. The DV charges relating to the original victim will be written on a DV form, used as a Summons & Complaint, and the other charges written on a regular, non-DV summons that identifies the victim of those offenses. If an offense report number is needed, the same number will be used on both summonses. The suspect must be booked into CJC on the DV misdemeanors, however, may be served

and released on the non-DV charges at the officer's discretion.

* * * * *

.11 Domestic Violence Investigations

Officers should remain cognizant of the fact that cases involving allegations of domestic violence may receive increased scrutiny from supervisors, prosecutors, judges, and community groups. For this reason, officers should make reasonable efforts to conduct as thorough an investigation as is practicable, under the circumstances, even in cases involving relatively minor criminal allegations. Officers should attempt to personally interview victims and suspects, as well as identify and interview witnesses, whenever practical. When visible injuries are present, officers shall photograph them whenever possible, and should carefully describe them in the narrative portion of their report or the DV packet. A statement from the attending physician should be included in the officer's report, if the victim receives medical treatment incidental to the initial investigation. Officers should review the victim's written statement, if any, for thoroughness and elements of the crime alleged, and should document their own observations, including those facts that serve to corroborate or refute statements of involved parties, on the Summons Narrative, the old form, or PC Affidavit on the new form portion of the DV packet or in offense report supplements. Officers may, at their discretion, require a case report if they feel it will facilitate the investigation or thorough documentation of details in supplemental reports.

Arrests for events that did not occur within an officer's presence must be based on probable cause, regardless of the insistence or reluctance of a party to sign a complaint. It is

the responsibility of investigating officers and supervisors to determine if probable cause exists for an arrest; when it does, the facts supporting it must be clearly documented by the officer, the victim, or both. When probable cause cannot be established, officers shall not take a signed complaint, make an arrest, or file criminal charges, even if a complainant demands to sign a complaint. When officers are uncertain whether or not probable cause exists, supervisory guidance should be obtained. Colorado statute stipulates that an officer is not required to arrest both parties merely because both claim to be victims, nor does it require an officer to arrest either party when the officer believes that no probable cause exists.

* * * * *

.12 Domestic Violence Pickup Procedure

If the suspect cannot be located prior to going off-shift, the officer shall complete a pickup in accordance with SOP P1-23 and deliver it along with the following paperwork to Records and ID. Copies of the DV paperwork may be faxed to records and ID and the original paperwork described below sent via interoffice mail.

Misdemeanors: The completed DV Form Summons & Complaint, with an original probable cause affidavit. The handwritten Summons Narrative or PC Affidavit portion on the back of Page 1 of the DV Packet may be used as the PC Affidavit in misdemeanor cases, so long as it is legible and contains sufficient detail to establish probable cause. When so used, this original page will be signed by the officer affiant and notarized.

Felonies: A completed DV Form, used as a felony face sheet, with an original PC affidavit and Information for

Preliminary Procedure attached. Felony PC Affidavits should not be handwritten, but will be typed on a separate page. The original must be signed and notarized. A photocopy of the PC Affidavit will be attached to each copy of the packet.

* * * * *

.50 Restraining Order Violations

Officers are required to make a custodial arrest of any person who violates a valid Restraining Order issued in this, or any other state, if probable cause exists that the restrained person has been properly served with or received actual notice of the order, and has violated any provision of the order. In determining probable cause, officers shall use information concerning active restraining orders obtained through the CBI Central Registry maintained on the CCIC computer system, as part of their basis for determining whether probable cause of a violation exists. However, officers should exercise extreme caution if basing their probable cause for an arrest exclusively upon information from the registry, and shall make every reasonable effort to confirm through other sources that the restraining order is valid and active. This can be accomplished through viewing a printed copy of the order provided by the victim, through admissions from the suspect that he/she is aware of the order's validity, through interviews with third parties who were witnesses to its service, by contacting the issuing court, or other investigative means. …

* * * * *

Cash Or Surety Bond - Before Domestic Violence suspects are released from jail, a Mandatory Restraining Order (MRO) prohibiting the arrestee from harassing or

intimidating the victim will be issued by the Court or by jail personnel acting on the Court's order, which will remain in effect until final disposition of the criminal case. In some instances No Contact provisions may be added to the MRO, which will expire three judicial days from the time of signature (when the defendant is released from jail). If an officer receives a call for service from a victim who claims the suspect has violated the MRO or No Contact provisions of a bond issued from jail, the officer must verify the order through personal inspection, the Central Registry, or by calling CJC Intake to verify the defendant's bond and the expiration date of the No Contact provision. If the violation is prior to the No Contact expiration, probable cause exists to arrest the suspect for:

18-6-803.5 C.R.S. Violation of Restraining Order
18-8-212 C.R.S. Violation of Bail Bond Conditions

* * * * *

- Colorado Springs Police Department

APPENDIX E

United States Department of Justice, Office of Violence Against Women & International Association of Chiefs of Police, *Protecting Victims of Domestic Violence: A Law Enforcement Officer's Guide to Enforcing Orders of Protection Nationwide* (visited Feb. 7, 2005) <www.vaw.umn.edu/documents/protesct/protect.html>.

This project was supported by a Cooperative Agreement awarded by the Violence Against Women Grants Office, Office of Justice Programs, U.S. Department of Justice, to the International Association of Chiefs of Police.

Publication Date: Not Available, *available at* http://www.vaw.umn.edu/documents/protect/protect.html#id2633419

What is full faith and credit?

- In 1994, Congress enacted the Violence Against Women Act (VAWA) directing jurisdictions 1 to give full faith and credit to valid orders of protection issued by other jurisdictions. 18 U.S.C. § 2265.

Simply stated, *full faith and credit* requires that:

- Valid orders of protection must be enforced to protect victims of domestic violence wherever a violation of an order occurs, regardless of where the order was issued.

What does this mean for victims?

- Abused persons who are granted orders of protection can now call upon law enforcement to protect them and to take all appropriate action against abusers nationwide.

What does this mean for abusers?

- The abuser is bound by the terms and conditions of the order of protection and may be arrested and charged with violating the order and committing other substantive crimes wherever the abuser violates a valid order. It does not make any difference where the order was granted. The abuser must be arrested for a violation of an order of protection if the law of the jurisdiction where the violation occurred requires an arrest.

What does this mean for law enforcement?

- If an order of protection is valid in the issuing jurisdiction, it must be enforced in every other jurisdiction. Some jurisdictions grant orders:
  - to victims who might not be eligible for orders in the enforcing jurisdiction
  - for periods of time longer than authorized in the enforcing jurisdiction
  - containing directives against abusers that might not be available in the enforcing jurisdiction

A responding officer **MUST ENFORCE** the terms and conditions of the order as written. Officers are not required to know the laws of the issuing jurisdiction in order to enforce orders of protection. Officers in the enforcing jurisdiction must comply with all laws, policies, and procedures of their own jurisdiction concerning violation of orders of protection, such as mandatory arrest and victim notification, if applicable.

Why is Full Faith and Credit Important?

- When victims of domestic violence leave, they and their children are at an increased risk of violence. Abusers

who cross jurisdictions in pursuit of victims may be engaged in stalking, which is a significant risk indicator of life-threatening violence.

* * * * *

What is an Order of Protection?

* * * * *

Determining the Terms and Conditions of an Order of Protection

- After providing for victim and officer safety, it is essential that the officer read the order in its entirety. An order may state something in one paragraph and specify exceptions in another. For example, an order may state that the abuser is to have "no contact" with a victim in one paragraph, and then in another state that contact may occur to arrange for visitation with the children. In this case, if the abuser contacted the victim for any reason other than to arrange for visitation, the order was violated.

* * * * *

What Enforcement Action should be Taken?

Immediate Action

- Ensure the safety of all involved
- Seek medical attention, if necessary
- Safeguard the victim from further abuse
- Secure and protect the crime scene
- Seek voluntary surrender of firearms for safekeeping purposes
- Seize firearms subjects to State, territorial, local, or tribal prohibitions

- Identify whether an order of protection has been violated
- Evaluate the validity and enforceability of the order
- Arrest for violation of the order where required by the enforcing jurisdiction
- Arrest for any other criminal offenses
- Seek an arrest warrant, when required, related to the criminal conduct if the abuser is not at the scene
- Attempt to locate and arrest the abuser

* * * * *

Helpful Interventions

* * * * *

Assessing Lethality

Factors to consider in determining serious injury/lethality potential:

- Threats of homicide/suicides
- History of domestic violence and violent criminal conduct
- Stalking
- Depression or other mental illness
- Obsessive attachment to victim
- Separation of parties
- Drug or alcohol involvement
- Possession or access to weapons
- Abuse of pets
- Destruction of victim's property
- Access to victim and victim's family and other supporters

* * * * *

Questions Frequently asked about Full Faith and Credit

What if the abuser has violated the order of protection and then fled the scene?

- Determine if abuser's actions warrant arrest
- Follow departmental procedure for dealing with a criminal suspect who has fled the scene
- Conduct safety planning and refer victim to appropriate court or advocacy agency

* * * * *

Enforcing Orders of Protection

Federal law requires that all valid orders of protection granted by a court of any jurisdiction be recognized and enforced as if they were issued by a court where the violation occurred.

Responding Officer's Procedures

A responding officer must enforce the terms and conditions of the order as written by the issuing jurisdiction.

The order of protection is presumed valid if it has the correct names of the parties, has not expired, and is signed by an issuing authority. It should be enforced pursuant to departmental policy and the laws of the enforcing jurisdiction.

Immediate Action

If the named respondent committed an offense under the criminal laws in the officer's jurisdiction and/or violated the court order, the officer should:

- Arrest respondent pursuant to the enforcing jurisdiction's law and departmental policy
- Initiate criminal complaint against respondent for the crime(s) committed and for violation of the order

Office of the Attorney General Washington, D.C. 20530

"Through its full faith and credit provision, the Violence Against Women Act is designed to ensure that valid protection orders are enforced in each and every jurisdiction in America. The statute affords important and often lifesaving protection for victims of domestic violence who cross state or tribal lines--whether to go to work, visit relatives, or seek safe haven from abuse. Law enforcement officers play a crucial role in ensuring that protection orders are enforced so that a victim is safe no matter where in the country she goes. I hope that you will find this booklet helpful in your efforts to stop domestic violence and save lives."

Janet Reno
Attorney General of the United States

International Association of Chiefs of Police

To America's Law Enforcement Officers:

Protecting victims of domestic violence is a critical part of our job. The actions you take in these situations can clearly save lives. Orders of protection are issued to ensure the safety of victims of domestic violence. We need to enforce these orders to the best of our abilities. The "full faith and credit" component of the 1994 Violence Against Women Act requires law enforcement officers to enforce valid orders across the boundaries of states, tribes and territories. Once an order of protection is issued by a jurisdiction, it is

enforceable in any other jurisdiction in the United States . Both the Attorney General and the IACP are deeply concerned about domestic violence. This booklet is an excellent primer on orders of protection and full faith and credit. I urge you to read it--and act on it.

Bobby D. Moody
IACP President

APPENDIX F

Colorado Spring Police Department, *General Order 612: Domestic Disturbances* (2003) .

Colorado Spring Police Department
General Order 612
Section 6: Enforcement of Criminal Laws
Restraining Orders

Active date: **9/26/2002**
Supersedes date: **9/24/2002**

.04 Policy

If any officer has reasonable grounds to believe that the subject named in an active Restraining Order has violated that order, the officer shall take the appropriate action described in this directive. Service of Civil Restraining Orders shall be done as described in Paragraph .12 below.

* * * * *

.10 Enforcement of Restraining Orders

Enforcement of all restraining orders shall be in accordance with section 18-6-803.5, CRS, Violation of Restraining Order, and any rules adopted by the Colorado supreme court pursuant to said section.

A person commits the crime of violation of a restraining order if such person contacts, harasses, injures, intimidates, molests, threatens, or touches any protected person, or enters or remains on premises, or comes within a specified distance of a protected person or premises, and such conduct is prohibited by a restraining order, after such person has been personally served with any such order or otherwise has acquired from the court actual knowledge of the contents of any such order.

Permanent Or Temporary Retraining Orders And EPO's:

If any officer has probable cause to believe that the subject named in an active Temporary or Permanent Restraining Order or Emergency Protection Order has violated or attempted to violate that order as described above and the restrained person has been properly served with a copy of the restraining order or the restrained person has received actual notice of the existence and substance of such order, the officer shall arrest according to procedure. The arrested person shall be removed from the scene of the arrest and shall be taken to the Criminal Justice Center for booking. The arrested person will be booked into jail on a Summons and Complaint for 18-6-803.5 C.R.S. Violation of Restraining Order. Any person violating a restraining order issued pursuant to cases involving domestic violence as defined in 18-6-800.3 .C.R.S. shall be booked into jail on a Domestic Violence Form Summons and Complaint.

In determining probable cause, officers shall use information concerning active restraining orders obtained through the CBI Central Registry maintained on the CCIC computer system as part of their basis for determining whether probable cause of a violation exists. However, officers should not base their probable cause for an arrest exclusively upon information from the registry, and shall make every reasonable effort to confirm through other sources that the restraining order is valid and active.

Note: As is the case with any Court order, a restraining order may be modified or terminated only by the Court. The parties to the order do not have the authority to modify or terminate the order themselves. The fact that the victim may have "invited" the suspect to violate the restraining order does not alter the fact that the order has been violated and the offender shall be arrested.

- *Colorado Springs Police Department*

Supreme Court, U.S.
FILED
FEB 10 2005
OFFICE OF THE CLERK

No. 04-278

IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,

Petitioner,

v.

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHERYN GONZALES, and LESLIE GONZALES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF NATIONAL COALITION AGAINST DOMESTIC VIOLENCE AND NATIONAL CENTER FOR VICTIMS OF CRIME AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

NAOMI G. BEER
Counsel of Record
LIBBY Y. MOTE
MICHELE E. STONE
GREENBERG TRAURIG, LLP
The Tabor Center
1200 Seventeenth Street
Suite 2400
Denver, Colorado 80202
(303) 572-6500

Counsel for National Coalition Against Domestic Violence and *National Center for Victims of Crime*

192688

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. The United States Legal System Sanctioned Domestic Violence For Many Years.	6
II. Civil Protective Orders Protect Victims Of Domestic Violence And Prevent Further Abuse.	10
III. Law Enforcement's Failure To Take Protective Orders Seriously Jeopardizes The Lives Of Battered Women And Their Children.	12
IV. Mandatory Arrest Laws Must Be Enforced To Effect Their Legislative Purpose And Promote The Safety Of Battered Women And Their Children.	18
CONCLUSION	26

TABLE OF CITED AUTHORITIES

Page

Cases:

Bradley v. State, 1 Miss., 156, 1824 WL 631 (Miss. 1824) 7, 8

City of Grafton v. Swanson, 497 N.W.2d 421 (N.D. 1993) 18

Eagleston v. Guido, 41 F. 3d 865 (2d Cir. 1994)*cert. denied*, 516 U.S. 808, 116 S. Ct. 53, 133 L. Ed. 2d 18 (1995) 14

Gonzales v. City of Castle Rock, 366 F.3d 1093 (10th Cir. 2004), *cert. granted*, 125 S. Ct. 417, 160 L. Ed. 2d 316 (2004) 3, 4, 5, 23

Joyner v. Joyner, 59 N.C. 322, 1862 WL 892 (N.C. 1862) 7

Skinner v. Skinner, 5 Wis. 449, 1856 WL 3888 (Wis. 1856) 7

State v. Oliver, 70 N.C. 60, 1874 WL 2346 (N.C. 1874) 8

State v. Rhodes, 61 N.C. 453, 1868 WL 1278 (N.C. 1868) 8

State v. Richardson, 670 N.W. 2d 267 (Minn. 2003) 11

Cited Authorities

Page

State v. Weatherholtz, 2003 WL 21543813 (Ohio App. 3 Dist. July 9, 2003) 11

Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984) 14

United States v. Harrison, 461 F.2d 1209 (U.S. App. D.C. 1972) 9

Statutes:

18 U.S.C. § 2265 19

42 U.S.C. § 3796hh 19

ALASKA STAT. § 18.65.530(a)(1) 20

ALASKA STAT. § 18.65.530(a)(2) 20

ARIZ. REV. STAT. ANN § 13-3601(B) 20

CAL. PENAL CODE § 836(d) 20

COLO. REV. STAT. § 18-6-803.5 ..... 4, 20

COLO. REV. STAT. § 18-6-803.6 20

CONN. GEN. STAT. ANN. § 46b-38b(a) 20

D.C. CODE Ann. § 16-1001, *et seq.* 9

Cited Authorities

	Page
D.C. CODE ANN. § 16-1031	20
IL. COMP. STAT. 60/304(a)(1)	20
IOWA CODE ANN. § 236.12(2)	20
KY. REV. STAT. ANN. § 403.760(2)	20
LA. REV. STAT. ANN. § 14:79(E)	20
LA. REV. STAT. ANN. § 46:2140(1)	20-21
MASS. GEN. LAWS ANN. CH. 209A, § 6(7)	20
MD. CODE ANN., FAM. LAW § 4-509(b)	20
ME. REV. STAT. ANN. tit. 19-A, § 4012(5)	20
MINN. STAT. ANN. § 518B.01, subd. 14(e) and subd. 22(c)	20
MO. REV. STAT. § 455.085(2)	20
N.D. CENT. CODE § 14- 07.1-11(1)	20
N.J. STAT. ANN. § 2C:25-18	23
N.J. STAT. ANN. § 2C:25-21(a)(1)	21
N.J. STAT. ANN. § 2C:25-21(a)(3)	20

Cited Authorities

	Page
N.M. STAT. ANN. § 40-13-6(C)	20
NEV. REV. STAT. ANN. § 33.070(1)	20
NEV. REV. STAT. ANN. § § 171.137(1)	21
OHIO REV. CODE ANN. § 2935.032	20, 21
OR. REV. STAT. § 133.310(3)	20
OR. REV. STAT. § 133.310(6)	21
23 PA. CONS. STAT. ANN § 6113(a)	20
R.I. GEN. LAWS § 12-29-3(b)	20, 21
S.D. CODIFIED LAWS § 23A-3-2.1(1)	20
S.D. CODIFIED LAWS § 23A-3-2.1(2)	21
TENN. CODE ANN. § 36-3-611(a)(2)	20
TEX. CRIM PROC. CODE ANN. § 14.03(b)	20
UTAH CODE ANN. § 30-6-8(1)	20
UTAH CODE ANN. § 30-6-8(2)	21
WASH. REV. CODE ANN. § 10.31.100(2)(a)	20
WASH. REV. CODE ANN. § 10.31.100(2)(c)	21

Page

WIS. STAT. ANN. § 813.12(7)(b) 20

WIS. STAT. ANN. § 96B.075(2) 21

Pub. L. No. 103-222, 108 Stat. 1796 (1994) 19

Pub. L. No. 106-386, Div. B, 114 Stat. 1464 (2000) 19

Treatises:

ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING (2000) 8

JAMES PTACEK, BATTERED WOMEN IN THE COURTROOM (1999) 14

NANCY K. D. LEMON, DOMESTIC VIOLENCE LAW (2001) 16

1 WILLIAM BLACKSTONE, COMMENTARIES 6

Other Authorities:

Amy Eppler, Note, *Battered Women and the Equal Protection Clause: Will the Constitution Help them When the Police Won't?*, 95 YALE L. J. 788 (1986) 15, 17

Page

Barbara J. Hart, Symposium: Mandatory Arrest Laws and Policies, *Arrest: What's the Big Deal*, 3 WM. & MARY J. WOMEN & L. 207 (1997) 13

Betsy Tsai, Note, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285 (2000) 7, 10

Catherine F. Klein & Leslye E. Orloff, Symposium on Domestic Violence, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Caselaw*, 21 HOFSTRA L. REV. 801 (1993) ... 8, 12

CHRISTOPHER D. MAXWELL, JOEL H. GARNER, & JEFFREY A. FAGAN, NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUST., RESEARCH IN BRIEF, THE EFFECTS OF ARREST ON INTIMATE PARTNER VIOLENCE: NEW EVIDENCE FROM THE SPOUSE ASSAULT REPLICATION PROGRAM (July 2001) 18

Christopher Shu-Bin Woo, *Familial Violence and the American Criminal Justice System*, 20 U. HAW. L. REV. 375 (1998) 10

David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L. J. 1153 (1995) 9, 11

Cited Authorities

Page

Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843 (2002) 8, 18, 19, 20, 24

Donna M. Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133 (1994) 25

Eva Jefferson Paterson, *How the Legal System Responds to Battered Women*, in BATTERED WOMEN (Donna M. Moore ed., 1979) 25

James Martin Truss, Comment, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L. J. 1149 (1995) 6, 7, 13, 14, 25, 26

Jeffrey Fagan, Presentation, *The Criminalization of Domestic Violence: Promises and Limits* (1996) 17

Jennifer R. Hagan, Symposium, *Can We Lose the Battle and Still Win the War?: The Fight Against Domestic Violence After the Death of Title III of the Violence Against Women Act*, 50 DEPAUL L. REV. 919 (2001) 14, 24

Cited Authorities

Page

Joan Zorza, Symposium on Domestic Violence Criminal Law, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46 (1992) 12, 15, 17

KERRY MURPHY HEALEY & CHRISTINE SMITH, NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUST., RESEARCH IN ACTION, BATTERER PROGRAMS: WHAT CRIMINAL JUSTICE AGENCIES NEED TO KNOW (July 1998) 13

Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1-42 (1992) 16

Leigh Goodmark, Symposium, The Legal Response to Domestic Violence: Problems and Possibilities, *Law is the Answer? Do We Know That For Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7 (2004) 9, 10, 20, 24

Machaela M. Hoctor, Comment, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. REV. 643 (1997) 15, 16, 17, 18, 24

Page

Marion Wanless, Note, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?*, 1996 U. ILL. L. REV. 533 (1996) 6, 7, 8, 20, 24, 25

MARTHA B. WITWER & CHERYL A. CRAWFORD, NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUST., A COORDINATED APPROACH TO REDUCING FAMILY VIOLENCE: CONFERENCE HIGHLIGHTS (NCJ 155184) (Oct. 1995) 12, 13, 24

Miriam H. Ruttenberg, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy*, 2 AM. U. J. GENDER & L. 171 (1994) 21

NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUST., LEGAL INTERVENTIONS IN FAMILY VIOLENCE: RESEARCH FINDINGS AND POLICY IMPLICATIONS (NCJ 171666) (July 1998) 11, 13, 19

NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUST., RESEARCH PREVIEW, CIVIL PROTECTION ORDERS: VICTIMS' VIEWS ON EFFECTIVENESS (Jan. 1998) 10, 11, 13

OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUST., LEGAL SERIES BULLETIN 4, ENFORCEMENT OF PROTECTIVE ORDERS (Jan. 2002) 10, 13

Page

PATRICIA TJADEN & NANCY THOENNES, NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUST., EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE (NCJ 181867) (July 2000) 11

Prentice L. White, *Stopping the Chronic Batterer Through Legislation: Will it Work this Time?*, 31 PEPP. L. REV. 709 (2004) 6

Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YALE L. J. 2117 (1996) 6, 7, 8

Sandra S. Park, *Working Towards Freedom from Abuse: Recognizing a "Public Policy" Exception to Employment-at-Will for Domestic Violence Victims*, 59 N. Y. U. ANN. SURV. AM. L. 121 (2003) 9

Sarah Mausolff Buel, Note, *Mandatory Arrest for Domestic Violence*, 11 Harv. WOMEN'S L. J. 213 (1988) 15, 24

Vito Nicholas Ciraco, Note, *Fighting Domestic Violence with Mandatory Arrest, Are We Winning?: An Analysis in New Jersey*, 22 WOMEN'S RTS. L. REP. 169 (2001) 7

Cited Authorities

Page

Miscellaneous:

David M. Herszenhorn, *Man Vowed All Week to Kill Companion, Neighbors Say*, N.Y. TIMES, Aug. 23, 1996 11

L.L. Brasier & John Masson, *Estranged Wife Killed With Ax*, DETROIT FREE PRESS, Dec. 31, 2002 11

National Ctr. For Victims of Crime, Stalking Resource Center, *Protective Order Violations – Stalking in Disguise*, THE SOURCE NEWSLETTER, Vol. 4, No. 2 (Fall 2004) 11

Protecting Victims of Domestic Violence: A Law Enforcement Officer's Guide to Enforcing Orders of Protection Nationwide 16

S. Rep. No. 103-138 (1993) 19

Tr. of Colorado House Judicial Committee Hearings on House Bill 1253, Feb. 15, 1994 23

U.S. DEP'T OF JUST., ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE: FINAL REPORT (1984) 18, 19

Yumi Wilson, *When Court Order Isn't Enough*, S.F. CHRON., Sept. 20, 1996 14

INTEREST OF AMICI CURIAE[1]

It is the mission of the National Coalition Against Domestic Violence ("NCADV") to address one of the greatest public health problems in America: domestic violence. NCADV is a nonprofit organization dedicated to providing advocacy, leadership, representation, and support to battered women and their children throughout the United States. NCADV's work includes coalition building at the local, state, regional, and national levels; support for the provision of community-based services such as safe houses and shelter programs; public education and technical assistance; policy development and innovative legislation; and efforts to eradicate the social conditions that contribute to domestic violence. NCADV's membership is comprised of over one thousand grassroots organizations, community programs, and individuals dealing with the concerns of battered women and their families.

NCADV was formally organized in January 1978, when over one hundred advocates from around the nation attended the U.S. Commission on Civil Rights hearings on battered women in Washington, D.C. Almost thirty years later, NCADV remains the only national organization of grassroots shelter and service programs for battered women. NCADV continues to be a leading voice on domestic violence issues in the community, the legislature, and in the courts.

---

1. No counsel for a party authored this brief in whole or in part. No person or entity other than counsel for the National Coalition Against Domestic Violence and the National Center for Victims of Crime made a monetary contribution to the preparation or submission of this brief. Petitioner and respondent have consented to the filing of this brief; their letters of consent have been filed with the Clerk of this Court.

NCADV organized testimony for the Attorney General's Task Force Hearings on Family Violence and worked with federal legislators to prioritize funding from the Victims of Crime Act for battered women's programs. In addition, NCADV supported the development and passage of the Violence Against Women Act in 1994 and was active in the passage of the Domestic Violence Offender Gun Ban in 1996. NCADV has been instrumental in implementing public policy and legislation that affect the lives of battered women and their children.

Likewise, the National Center for Victims of Crime ("NCVC") is a nonprofit organization whose mission is to forge a national commitment to helping victims of crime rebuild their lives. NCVC is the nation's leading resource and advocacy organization for all victims of crime. Dedicated to serving individuals, families, and communities harmed by crime, NCVC, among other efforts, promotes laws and public policies that create resources and secure rights and protections for crime victims.

In particular, NCVC has demonstrated a strong commitment to victims of domestic violence, stalking, sexual assault, child abuse, and all those who are granted court orders of protection. NCVC's Public Policy Department was instrumental in the passage of the Violence Against Women Act in 1994 and its reauthorization in 2000. Additionally, NCVC's Stalking Resource Center provides training and technical assistance to law enforcement agencies across the country on the importance of protective orders and the need for their enforcement.

The issues presented in this case affect significant matters of public policy and are of vital concern to all victims of domestic violence. A decision by this Court will have

implications far beyond the interests of Jessica Gonzales and the City of Castle Rock. In their role as advocates, it is incumbent upon the NCADV and NCVC (collectively, "*amici*") to provide any additional facts necessary to inform and aid the Court in its deliberation on the issues. Therefore, *amici* submit the following historical overview of the genesis of mandatory arrest laws and their import to the enforcement of protective orders and the safety of battered women and children.

SUMMARY OF ARGUMENT

Domestic violence is a widespread and longstanding problem that continues to exact its toll on the lives of battered women and their children. In this country, victims of domestic violence have only begun to see changes within the last forty years. The lack of enforcement of these changes by police, however, has had devastating consequences. The lethal aftermath of police indifference is no more apparent than in the case of *Gonzales v. City of Castle Rock*, 366 F.3d 1093 (10th Cir. 2004), *cert. granted*, 125 S. Ct. 417, 160 L. Ed. 2d 316 (2004).

On the night of June 22, 1999, Jessica Gonzales telephoned the Castle Rock Police Department numerous times and appeared in person at the police station requesting enforcement of a restraining order against her estranged husband, Simon Gonzales, after he abducted their three daughters. *Id.* at 1097-98. Each time she sought the protection of the police and the safe return of her children, Jessica's pleas for help were ignored. *Id.* The Castle Rock Police Department refused to enforce the temporary restraining order in direct violation of Colorado's mandatory arrest law, a statute that removed any doubt as to the appropriate response and required the responding officers to arrest Simon

Gonzales. *Id.* at 1103-04; COLO. REV. STAT. § 18-6-803.5(3). While Jessica Gonzales was trying in vain to have the restraining order against her husband enforced, Simon Gonzales murdered the three girls. *Id.* at 1098. The Gonzales children were ages ten, nine, and seven. *Id.* at 1096.

Following an era when domestic violence was condoned by society and sanctioned by law, the civil protective order emerged at the forefront of the battle against domestic violence. The civil protective order represented one of the earliest and most commonly used interventions to help save the lives of battered women and their children. But, in many situations, orders of protection were effective only when police officers enforced them and abusers believed they would be enforced. For years, law enforcement failed to treat domestic violence as a crime or arrest the men who committed abuse and violated protective orders. It was this climate that gave rise to the mandatory arrest law.

Mandatory arrest laws were enacted to combat one of the most serious obstacles to curtailing the epidemic of domestic violence in America – police indifference. Mandatory arrest legislation was intended to alleviate the obstacle of under-enforcement by prohibiting police from dismissing domestic violence victims out of hand. Indeed, the Colorado legislation under which Jessica Gonzales sought enforcement of her protective order was passed to counteract the very attitudes that led to the deaths of three innocent children. Mandatory arrest laws, now in effect in more than twenty states and the District of Columbia, remove or restrict a law enforcement officer's discretion in determining whether to make an arrest in domestic violence cases. Mandatory arrest thus criminalizes domestic violence and sends a clear message to victims and perpetrators that the law will be enforced.

As *Gonzales* demonstrates, a protective order, without the backing of police enforcement, is only part of the solution. Orders of protection must be taken seriously, and mandatory arrest laws must be respected to ensure that the advances made in improving law enforcement's response to domestic violence endure. When the police fail to enforce the law, the severity of domestic violence is dismissed, abusers are empowered, and the foundation of the criminal justice system is weakened.

The Tenth Circuit Court of Appeals' decision in this case reaffirms to society and to law enforcement that domestic violence and the violation of protective orders are grievous crimes that must be treated accordingly. This nation has made tremendous strides in the protection and support of domestic violence victims over the last forty years. The protective order Jessica Gonzales sought to have enforced represented the promise that law enforcement would no longer dismiss claims of domestic violence. A reversal of the Tenth Circuit's decision will undo those efforts and represent a step backward in the struggle against family abuse. It will undermine the very purpose for which protective orders and mandatory arrest laws were implemented and dismantle the rights and remedies that the Colorado legislature so meticulously pieced together in the protection of battered women and their children. For these reasons, *amici* support Jessica Gonzales in urging this Court to affirm the decision of the Tenth Circuit Court of Appeals.

ARGUMENT

I. The United States Legal System Sanctioned Domestic Violence For Many Years.

The United States' early legacy of explicit approval of and, later, utter indifference to, acts of domestic violence traces its roots back to Roman times. In the year 753 B.C., Ancient Rome created the Laws of Chastisement, which expressly permitted husbands to strike their wives as a method of preventing the wife from exposing her husband to criminal and civil liability. *See* Prentice L. White, *Stopping the Chronic Batterer Through Legislation: Will It Work This Time?*, 31 PEPP. L. REV. 709, 714 (2004).

William Blackstone, the eighteenth century English legal scholar, subsequently endorsed and codified "domestic chastisement" as a form of behavior modification that was a tolerable and crucial part of the male-dominated family structure. 1 WILLIAM BLACKSTONE, COMMENTARIES *432-33; *see also* White, *supra*, 31 PEPP. L. REV. at 715. Under English common law, a man was allowed to beat his wife with a rod no larger than his thumb or small enough to pass through a wedding band; hence, the notorious "rule of thumb." *See* Marion Wanless, Note, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?*, 1996 U. ILL. L. REV. 533, 535-36 (1996); *see also* James Martin Truss, Comment, *The Subjection of Women ... Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L. J. 1149, 1157 (1995). The law permitted corporal punishment as long as the husband did not inflict "permanent injury" upon his wife. *See* Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YALE L. J. 2117, 2118 (1996). The colonists

later brought this common law doctrine to America. *See* Vito Nicholas Ciraco, Note, *Fighting Domestic Violence with Mandatory Arrest, Are We Winning?: An Analysis in New Jersey*, 22 WOMEN'S RTS. L. REP. 169, 172 (2001).

Colonial America's permissive attitude toward domestic violence and wife abuse continued well into the mid-nineteenth century. *See id.*; *see also* Wanless, *supra*, 1996 U. ILL. L. REV. at 535-36. This tradition was reflected in a number of cases from the states' highest courts. *See*, *e.g.*, *Bradley v. State*, 1 Miss. 156, 1824 WL 631, *1 (Miss. 1824) (upholding husband's entitlement to "exercise the right of moderate chastisement"); *Joyner v. Joyner*, 59 N.C. 322, 1862 WL 892, *3 (N.C. 1862) (declaring that "the law gives the husband power to use such a degree of force as is necessary to make the wife behave herself and know her place"). As one court explained, "when the wife is ill treated on account of her own misconduct, her remedy is a reform of her own manners." *Skinner v. Skinner*, 5 Wis. 449, 1856 WL 3888, *3 (Wis. 1856).

By the end of the nineteenth century, wife-beating was no longer sanctioned by the doctrine of domestic chastisement, but courts continued to turn a blind eye to domestic abuse under the theory that doing so preserved the so-called "sanctity of the home," protected the "privacy of the marriage relationship," and served to "promote domestic harmony." *See* Truss, *supra*, 26 ST. MARY'S L. J. at 1159; *see also* Siegel, *supra*, 105 YALE L. J. at 2120. According to prevailing reasoning, domestic violence was a private family matter, and the government was loathe to interfere in the sanctified realm of the family. *See* Betsy Tsai, Note, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285, 1288-

89 (2000); *see also* Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1850-51 (2002). As one court declared: "We will not inflict upon society the greater evil of raising the curtain upon domestic privacy to punish the lesser evil of trifling violence." *State v. Rhodes*, 61 N.C. 453, 1868 WL 1278, *4 (N.C. 1868); *see also Bradley*, 1824 WL 631 at *1 (noting that "family broils and dissentions" were not the business of the court); *State v. Oliver*, 70 N.C. 60, 1874 WL 2346, *2 (N.C. 1874) (stating that "[i]f no permanent injury has been inflicted, . . . it is better to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive"). Consequently, while no longer legally sanctioned, domestic violence continued virtually unacknowledged by the public and unabated by the justice system until the 1960s. Wanless, *supra*, 1996 U. ILL. L. REV. at 536.

With the evolution of the battered women's movement in the late 1960s and early 1970s, it became readily apparent that the domestic violence crisis in America was anything but "trifling" – it was an epidemic. *Id.*; Epstein, *supra*, 43 WM. & MARY L. REV. at 1849-50; *accord* Siegel, *supra*, 105 YALE L. J. at 2171-73. In reaction to staggering statistics documenting the incidence of domestic violence,[2] the community responded with social services in the form of safe houses, women's shelters, and other programs to assist victims and educate the public. *See* ELIZABETH SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 13-23 (2000)

2. *See, e.g.*, Catherine F. Klein & Leslye E. Orloff, Symposium on Domestic Violence, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Caselaw*, 21 HOFSTRA L. REV. 801, 807-810 (1993) (compiling statistics from late 1970s to early 1990s as reported by Bureau of Justice Statistics, Department of Justice, National Institutes of Mental Health, and congressional hearings).

(tracing history of domestic violence reform); *see also* Leigh Goodmark, Symposium, The Legal Response to Domestic Violence: Problems and Possibilities, *Law is the Answer? Do We Know That For Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 9 (2004). Legislative responses in the form of civil interventions on behalf of battered women followed shortly thereafter. Goodmark, *supra*, 23 ST. LOUIS U. PUB. L. REV. at 9-10.

One of the earliest innovations that was developed to ensure domestic violence would be treated seriously was the civil protective order. *See id.* at 10; *see also* David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L. J. 1153, 1170 (1995). In 1970, the District of Columbia passed the first law providing for protective orders in cases of domestic violence. *See* D.C. CODE § 16-1001, *et seq.*; *see also United States v. Harrison*, 461 F.2d 1209 (U.S. App. D.C. 1972). Before that time, the only civil tools available to battered women were injunctions pursuant to divorces or legal separation – remedies that provided limited relief, were difficult to enforce, and useless to women who were not married to their abusers. Goodmark, *supra*, 23 ST. LOUIS U. PUB. L. REV. at 10 n.14. By 1989, all fifty states and the District of Columbia had enacted statutes authorizing civil protective orders as a means of protecting victims of domestic violence and preventing further abuse. *See id.* at 10; *see also* Sandra S. Park, *Working Towards Freedom from Abuse: Recognizing a "Public Policy" Exception to Employment-at-Will for Domestic Violence Victims*, 59 N.Y.U. ANN. SURV. AM. L. 121, 147 n.123 (2003) (listing current protective order statutes from all fifty states).

II. Civil Protective Orders Protect Victims Of Domestic Violence And Prevent Further Abuse.

The civil protective order remains one of the most widely available and commonly used interventions for victims of domestic violence today. *See* Goodmark, *supra*, 23 ST. LOUIS U. PUB. L. REV. at 10-11; *see also* Tsai, *supra*, 68 FORDHAM L. REV. at 1292. Indeed, orders of protection have been recognized as "the frontline in the war against the abuse of women." Christopher Shu-Bin Woo, *Familial Violence and the American Criminal Justice System*, 20 U. HAW. L. REV. 375, 392 and n.116 (1998). One of their greatest strengths is that courts have broad discretion in tailoring a protective order to meet the unique circumstances of the battered woman and her family. *Id.* at 394. Among other things, an order of protection can include provisions restricting contact; prohibiting abusive behavior; determining child custody and visitation issues; mandating offender counseling; and even forbidding firearm possession. OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUST., LEGAL SERIES BULLETIN 4, ENFORCEMENT OF PROTECTIVE ORDERS 1 (Jan. 2002).

Furthermore, protective orders often reduce the incidence of future violence and play a key role in improving a victim's own sense of safety. Studies have shown that in the majority of cases, victims feel that civil protective orders protect them against repeated incidents of abuse and are valuable in helping them regain their emotional well-being, sense of security, and overall control over their lives. NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUST., RESEARCH PREVIEW, CIVIL PROTECTION ORDERS: VICTIMS' VIEWS ON EFFECTIVENESS 1 (Jan. 1998). Simply filing for a retraining order can be an act that empowers a battered woman and interrupts the pattern of domination and control by her abuser. *See* Goodmark, *supra*, 23 ST. LOUIS U. PUB. L. REV. at 11.

But orders of protection, standing alone, do not contain sufficient civil or criminal mechanisms to enforce them. *See* Zlotnick, 56 OHIO ST. L. J. at 1171; *see also* NATIONAL INST. OF JUSTICE, *supra*, VICTIMS' VIEWS ON EFFECTIVENESS at 1. Approximately sixty percent of the women who obtain temporary restraining orders report that the orders are violated in the year after they were issued. NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUST., LEGAL INTERVENTIONS IN FAMILY VIOLENCE: RESEARCH FINDINGS AND POLICY IMPLICATIONS (NCJ 171666) 50 (July 1998). Nearly a third of those women, twenty-nine percent, report that the violations involved severe violence. *Id.*; *see also* PATRICIA TJADEN & NANCY THOENNES, NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUST., EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE (NCJ 181867) 54 (July 2000). This story has played out tragically in newspapers and courts across the country.[3]

3. *See, e.g., State v. Richardson*, 670 N.W.2d 267 (Minn. 2003) (involving estranged husband who murdered wife's friend and kidnapped and terrorized wife and children after wife obtained restraining order); *State v. Weatherholtz*, 2003 WL 21543813 (Ohio App. 3 Dist. July 9, 2003) (concerning estranged husband who entered wife's home, forced her to engage in sexual acts, and threatened to commit suicide and kill members of her family after protective order was in place); National Ctr. For Victims of Crime, Stalking Resource Center, *Protective Order Violations – Stalking in Disguise*, THE SOURCE NEWSLETTER, Vol. 4, No. 2 at 1 (Fall 2004) (recounting man who killed estranged girlfriend and then turned gun on himself; police found no-contact order next to woman's body, which man had violated four times before murdering victim); L.L. Brasier & John Masson, *Estranged Wife Killed With Ax*, DETROIT FREE PRESS, Dec. 31, 2002 (involving estranged husband who killed wife with ax while she slept next to two-year-old son five days after wife obtained personal protection order against him); David M. Herszenhorn, *Man Vowed All Week to Kill Companion, Neighbors Say*, N.Y. TIMES, Aug. 23, 1996, at B3 (concerning woman stabbed to death by her estranged husband while carrying one of two protective orders in her purse).

Moreover, orders of protection advance the safety of children as well as adults. *See* Joan Zorza, Symposium on Domestic Violence Criminal Law, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 46-47 (1992). An estimated 3.3 to 10 million American children witness domestic violence annually. MARTHA B. WITWER & CHERYL A. CRAWFORD, NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUST., A COORDINATED APPROACH TO REDUCING FAMILY VIOLENCE: CONFERENCE HIGHLIGHTS (NCJ 155184) Appendix B at 35 (Oct. 1995). In addition to the obvious psychological and emotional impact on children, there is a strong connection between domestic violence and child abduction. *See* Klein & Orloff, *supra*, 21 HOFSTRA L. REV. at 972 (noting importance of courts' awareness of connection so that civil protective orders can help deter ongoing risk of child snatching in families with history of domestic violence). Over fifty percent of abductions occur in the context of domestic violence, and seventy-seven percent of the abductors snatched the children out of a desire to hurt the other parent. *Id.* (citing studies in The Women's Advocate and the Task Force on Child Abuse and Neglect). The abduction and murder of the Gonzales children is yet another heartbreaking manifestation of how a civil protective order can fall short of saving the lives it was intended to protect.

III. Law Enforcement's Failure To Take Protective Orders Seriously Jeopardizes The Lives Of Battered Women And Their Children.

As the foregoing discussion demonstrates, court orders alone cannot stem the tide of domestic violence and deter the abusers. One of the most serious limitations of civil protective orders has been the widespread lack of

enforcement by police. NATIONAL INST. OF JUSTICE, *supra*, LEGAL INTERVENTIONS IN FAMILY VIOLENCE at 43. This lack of enforcement was founded upon a tradition of police indifference to the plight of battered women.

It goes without saying that the effectiveness of civil protective orders to protect victims of domestic violence and prevent further abuse depends on how well they are enforced. *See* NATIONAL INST. OF JUSTICE, *supra*, VICTIMS' VIEWS ON EFFECTIVENESS at 1; *see also* Truss, *supra*, 26 ST. MARY'S L. J. at 1188. In many situations, protective orders are effective only when the restrained party is convinced that the order will be enforced by the police. OFFICE FOR VICTIMS OF CRIME, *supra*, ENFORCEMENT OF PROTECTIVE ORDERS at 1. As the Justice Department has declared: "Unequivocal, standardized enforcement of court orders is imperative if protective orders are to be taken seriously by the offenders they attempt to restrain." *Id.*

The police must play a key role in protecting family members by enforcing orders of protection and arresting perpetrators who violate them. NATIONAL INST. OF JUSTICE, *supra*, A COORDINATED APPROACH at 7. Victims of domestic violence can be endangered by any breakdown in communication, failure of training, or lack of follow-through in the criminal justice system. KERRY MURPHY HEALEY & CHRISTINE SMITH, NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUST., RESEARCH IN ACTION, BATTERER PROGRAMS: WHAT CRIMINAL JUSTICE AGENCIES NEED TO KNOW 9 (July 1998). Law enforcement officers are "the gatekeepers of the criminal legal system," and their power to arrest is the "first link in a vital chain of institutional interventions that save the lives of battered women and children[.]" Barbara J. Hart, Symposium: Mandatory Arrest Laws and Policies, *Arrest: What's the Big Deal*, 3 WM. & MARY J. WOMEN & L. 207,

211 (1997); *see also* Truss, *supra*, 26 St. Mary's L. J. at 1189 and n.121 (noting that law enforcement officers are domestic violence victim's "first line of defense" and only direct link to criminal justice system). The power to make arrests is, in turn, the state's "first line of attack" on domestic violence within its borders. Jennifer R. Hagan, Symposium, *Can We Lose the Battle and Still Win the War?: The Fight Against Domestic Violence After the Death of Title III of the Violence Against Women Act*, 50 DePaul L. Rev. 919, 935 (2001). When police do not enforce existing laws, the very foundation of the state's criminal justice system, in the context of domestic violence and civil protective orders, is threatened. *Id.*

Until recently, law enforcement's under-enforcement of laws involving domestic violence was widespread.[4] Women regularly encountered police officers who treated domestic violence as "non-serious, non-criminal, or as a private matter best settled within the home." Truss, *supra*, 26 St. Mary's L. J. at 1189. Such archaic misconceptions and stereotypes contributed to law enforcement's failure to arrest men who were abusing their partners or violating protective orders. *See id.*; *see also* James Ptacek, Battered Women in the Courtroom 161-63 (1999) (describing police response to domestic violence calls).

4. *See, e.g.*, *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984) (involving police refusal to respond to woman's repeated requests for protection; police watched as estranged husband stabbed and kicked her in the neck, throat, and chest, paralyzing her from the neck down and causing permanent disfigurement); *Eagleston v. Guido*, 41 F.3d 865, 869 (2d Cir. 1994) (concerning husband who brutally stabbed wife 30 times despite entreaties to police that he was violating protective order), *cert. denied*, 516 U.S. 808, 116 S. Ct. 53, 133 L. Ed. 2d 18 (1995); Yumi Wilson, *When Court Order Isn't Enough*, S.F. Chron., Sept. 20, 1996, at A1 (recounting woman murdered by her ex-boyfriend after she reported that he had violated restraining order against him several times, yet police took no action).

All too often, police responded to domestic violence calls either by taking no action at all, by purposefully delaying response in the hope of avoiding confrontation, or, when officers did respond, by attempting to mediate the situation and separate the parties so they could "cool off." *See* Machaela M. Hoctor, Comment, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 Cal. L. Rev. 643, 649 (1997). Data collected by several agencies suggested that police seldom made arrests in cases of domestic violence to which they actually responded – as little as three to fourteen percent of the time. *See* Sarah Mausolff Buel, Note, *Mandatory Arrest for Domestic Violence*, 11 Harv. Women's L. J. 213, 217 (1988) (citing various studies on low arrest rates by police). When an arrest was made, it was usually because the abuser was belligerent or violent to the officers themselves, not as a result of the obvious abuse inflicted upon the woman. Hoctor, *supra*, 85 Cal. L. Rev. at 649. Other anecdotal evidence suggested that officers openly blamed the wives for being victims of domestic violence or made comments implying that they deserved to be beaten by their husbands. *See* Amy Eppler, Note, *Battered Women and the Equal Protection Clause: Will the Constitution Help them When the Police Won't?*, 95 Yale L. J. 788, 798 n.46 (1986); *see also* Zorza, *supra*, 83 J. Crim. L. & Criminology at 47-52 (discussing police response to domestic violence calls).

Therefore, not only were battered women threatened by the violence they faced, but they were also struggling against a tradition of police indifference – even open hostility – that severely limited the efficacy of the criminal justice system. Significantly, law enforcement's dismissive approach to domestic violence calls and the cries of battered women for protection was not attributable to a few "rogue officers."

Hoctor, *supra*, 85 CAL. L. REV. at 649. To the contrary, throughout the 1960s, 1970s, and 1980s, law enforcement policies characterized domestic violence as a private matter between the parties in which it should not interfere. *Id.*

In 1967, the International Association of Chiefs of Police declared in its training manual that "in dealing with family disputes,[5] the power of arrest should be exercised as a last resort." Lawrence W. Sherman, *The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence*, 83 J. CRIM. L. & CRIMINOLOGY 1-42 (1992), reprinted in NANCY K. D. LEMON, DOMESTIC VIOLENCE LAW 499 (2001). This position was later endorsed by the American Bar Association, whose 1973 *Standards for the Urban Police Function* stated that police should "engage in the resolution of conflict such as that which occurs between husband and wife ... in the highly populated sections of the large city, without reliance upon criminal assault or disorderly conduct statutes." *Id.* The Oakland Police Department's 1975 training manual described the role of a police officer in a domestic violence case as "more often that of a mediator

5. Even the characterization of domestic violence as a "family dispute" attributed to the continuing notion that domestic violence was not a crime but a private matter less deserving of law enforcement's attention. It is interesting to note that the International Association of Chiefs of Police has since renounced its earlier position on this issue. Today, the organization pronounces to all of America's law enforcement officers: "Protecting victims of domestic violence is a critical part of our job. The actions you take in these situations can clearly save lives. Orders of protection are issued to ensure the safety of victims of domestic violence. We need to enforce these orders to the *best* of our abilities." *See Protecting Victims of Domestic Violence: A Law Enforcement Officer's Guide to Enforcing Orders of Protection Nationwide* at 10, available at Violence Against Women Online Resources, http://www.vaw.umn.edu.

and peacemaker than enforcer of the law. . . . Normally, officers should adhere to the policy that arrests shall be avoided[.]" Zorza, *supra*, 83 J. CRIM. L. & CRIMINOLOGY at 48. Similarly, Michigan's policy directed officers to "[a]void arrest if possible" and to "[a]ppeal to their [complainant's] vanity" in discouraging arrest and the initiation of criminal proceedings. *Id.* at 49.

While the law no longer expressly granted men the right to beat and terrorize their partners, these law enforcement protocols continued to implicitly condone domestic violence and the actions of the abusers. *See* Eppler, *supra*, 95 YALE L. J. at 792-93. The end result was that domestic violence calls were assigned a low priority by police officers and were not treated as real crimes with potentially lethal consequences. Zorza, *supra*, 83 J. CRIM. L. & CRIMINOLOGY at 47. Moreover, police officers considered domestic violence calls to be "unglamorous, nonprestigious, and unrewarding" as compared to other offenses. *Id.*

Even after efforts to train and educate police officers began to emerge, law enforcement still avoided formal legal proceedings against the abusers. Jeffrey Fagan, Presentation, *The Criminalization of Domestic Violence: Promises and Limits* 8 (1996). Police officers were trained in crisis intervention, counseling, and mediation techniques – anything but arresting the violent abuser. *Id.* By 1984, only ten percent of large city police departments in the United States encouraged officers to make arrests for crimes of domestic violence. *See* Hoctor, *supra*, 85 Cal. L. Rev. at 650. However, the public began to realize that law enforcement's endemic failure to enforce the law could be devastating, even deadly. The tradition of police indifference brought about a call to action by the federal government and set the stage for the rise of mandatory arrest laws.

IV. Mandatory Arrest Laws Must Be Enforced To Effect Their Legislative Purpose And Promote The Safety Of Battered Women And Their Children.

Based upon the empirical and anecdotal evidence documenting law enforcement's reluctance to intervene on behalf of battered women or to treat domestic violence as a serious crime subject to arrest, major policy changes in the areas of police response and assistance became imperative. In 1984, the Attorney General's Task Force on Family Violence identified the failure of law enforcement to arrest for crimes of domestic violence as one of the most formidable obstacles to curtailing the epidemic of domestic violence in the United States. U.S. DEP'T OF JUST., ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE: FINAL REPORT 16-18 (1984); *see also* Hoctor, *supra*, 85 Cal. L. Rev. at 650. Following several well-publicized studies on the effectiveness of mandatory arrest in domestic violence cases,[6] the Attorney General called for a "strong, coordinated

6. The most highly publicized study was conducted by researchers Lawrence Sherman and Richard Berk in 1984. Epstein, *supra*, 43 WM. & MARY L. REV. at 1854. The study, known as the Minneapolis Domestic Violence Experiment, reported that arrest significantly reduced the risk of re-offense over a six month period, as compared with alternative police responses of either ordering one party out of the residence or advising the couple on how to solve their problems at the scene. CHRISTOPHER D. MAXWELL, JOEL H. GARNER, & JEFFREY A. FAGAN, NATIONAL INST. OF JUSTICE, U.S. DEP'T OF JUST., RESEARCH IN BRIEF, THE EFFECTS OF ARREST ON INTIMATE PARTNER VIOLENCE: NEW EVIDENCE FROM THE SPOUSE ASSAULT REPLICATION PROGRAM 4 (July 2001). Findings from a recent replication study "provide systematic evidence supporting the argument that arresting male batterers may, independent of other criminal justice sanctions and individual processes, reduce subsequent intimate partner violence." *Id.* at 13; *see also City of Grafton v. Swanson*, 497 N.W.2d 421, 423 (N.D. 1993) (recognizing direct correlation between ineffective police intervention in domestic violence cases and continued existence of such violence).

effort by the criminal justice system" and issued a report recommending arrest as the standard response to all cases of misdemeanor domestic assault. ATTORNEY GENERAL'S TASK FORCE, *supra*, at 5-6, 17; *see also* Epstein, *supra*, 43 WM. & MARY L. REV. at 1854. Subsequent congressional hearings involved extensive testimony on law enforcement's longstanding practice of treating domestic violence less seriously than other similarly violent crimes. *See, e.g.*, S. Rep. No. 103-138, at 41 (1993) (citing Washington, D.C. study that in 85% of cases where woman was found bleeding, police failed to arrest her attacker).

Finally, on September 13, 1994, President Clinton signed the Violence Against Women Act ("VAWA") into law as part of the Omnibus Crime Bill of 1994. *See* Pub. L. No. 103-222, 108 Stat. 1796 (1994) (reauthorized in 2000 by Pub. L. No. 106-386, Div. B, 114 Stat. 1464 (2000)). The VAWA represented a significant turning point in the battered women's movement in two material respects. First, it recognized protective orders as one of the most important methods of combating domestic violence and protecting battered women and their children. *See* 18 U.S.C. § 2265 (requiring states to give full faith and credit to protective orders issued by other states). Second, the VAWA included a provision requiring mandatory arrest or pro-arrest policies as a condition for receipt of funding by state and local governments. *See* 42 U.S.C. § 3796hh (endorsing mandatory arrest and pro-arrest policies); *see also* NATIONAL INST. OF JUSTICE, *supra*, LEGAL INTERVENTIONS IN FAMILY VIOLENCE at 38 n.4. In the wake of the pronouncements by the Attorney General and the testimony generated from the congressional hearings, many states, including Colorado, began passing mandatory arrest laws. This legislation represented a reversal in law enforcement's "long-standing nonintervention

protocol" in domestic violence cases. Epstein, *supra*, 43 WM. & MARY L. REV. at 1855.

Mandatory arrest laws are designed to remove or otherwise restrict an officer's discretion in determining whether to make an arrest when responding to a domestic violence call. Goodmark, *supra*, 23 St. LOUIS U. PUB. L. REV. at 15. As such, mandatory arrest laws counteract the systemic problem of police indifference. Wanless, *supra*, 1996 U. ILL. L. REV. at 542. Today, Colorado is one of more than twenty states and the District of Columbia that have implemented statutes mandating arrest in domestic violence situations.[7]

7. *See* Epstein, *supra*, 43 WM. & MARY L. REV. at n.42 (cataloguing mandatory arrest statutes). The following states mandate arrest when there is probable cause to believe that a violation of a protective order has occurred: ALASKA STAT. § 18.65.530(a)(2); CAL. PENAL CODE § 836(c); COLO. REV. STAT. § 18-6-803.5; KY. REV. STAT. ANN. § 403.760(2); LA. REV. STAT. ANN. § 14:79(E); MD. CODE ANN., FAM. LAW § 4-509(b); MASS. GEN. LAWS ANN. ch. 209A, § 6(7); ME. REV. STAT. ANN. tit. 19-A, § 4012(5); MINN. STAT. ANN. § 518B.01, subd. 14(e) and subd. 22(c); MO. REV. STAT. § 455.085(2); NEV. REV. STAT. ANN. § 33.070(1); N.J. STAT. ANN. § 2C:25-21(a)(3); N.M. STAT. ANN. § 40-13-6(C); N.D. CENT. CODE § 14- 07.1-11(1); OHIO REV. CODE ANN. § 2935.032; OR. REV. STAT. § 133.310(3); 23 PA. CONS. STAT. ANN § 6113(a); R.I. GEN. LAWS § 12-29-3(b)(1); S.D. CODIFIED LAWS § 23A-3-2.1(1); TENN. CODE ANN. § 36-3-611(a)(2); TEX. CRIM PROC. CODE ANN. § 14.03(b); UTAH CODE ANN. § 30-6-8(1); WASH. REV. CODE ANN. § 10.31.100(2)(a); WIS. STAT. ANN. § 813.12(7)(b). The following states mandate arrest when there is a finding of domestic violence regardless of whether a protection order has been violated: ALASKA STAT. § 18.65.530(a)(1); ARIZ. REV. STAT. ANN. § 13-3601(B); COLO. REV. STAT. § 18-6-803.6; CONN. GEN. STAT. ANN. § 46b-38b(a); D.C. CODE ANN. § 16-1031; IL. COMP. STAT. 60/304(a)(1); IOWA CODE ANN. § 236.12(2)(b); LA. REV. STAT. ANN. (Cont'd)

Under these statutes, there are generally five circumstances that are grounds for mandatory arrest:

> (1) when there is probable cause to believe violence has occurred or is likely to occur; (2) when there is probable cause to believe a protection order has been violated; (3) when a violation of a protection order occurs in the officer's presence; (4) when there is probable cause of aggravated battery; and/or (5) when the officer observes a physical injury.

Miriam H. Ruttenberg, *A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy*, 2 AM. U. J. GENDER & L. 171, 180 n.44 (1994) (cataloguing mandatory arrest laws).

While the language, scope, and threshold of mandatory arrest laws vary from state to state, the legislative intent has always been the same: to criminalize domestic violence, protect battered women and children, and combat police indifference by removing some level of discretion in the decision to arrest. Each mandatory arrest law sends an unequivocal message to abusers, victims, and society alike that domestic violence and civil protective orders will be taken seriously, that the law will be enforced, and that battered women and children will be safeguarded. The corresponding mandate that police

(Cont'd)
§ 46:2140(1); ME. REV. STAT. ANN. tit. 19-A, § 4012(5); NEV. REV. STAT. ANN. § 171.137(1); N.J. STAT. ANN. § 2C:25-21(a)(1); OHIO REV. CODE ANN. § 2935.032; OR. REV. STAT. § 133.310(6); R.I. GEN. LAWS § 12-29-3(b); S.D. CODIFIED LAWS § 23A-3-2.1(2); UTAH CODE ANN. § 30-6-8(2); WASH. REV. CODE ANN. § 10.31.100(2)(c); WIS. STAT. ANN. § 968.075(2).

officers take affirmative action in these circumstances is equally as clear.

The New Jersey legislature eloquently articulated the purpose behind its mandatory arrest law as follows:

> The Legislature finds and declares that domestic violence is a serious crime against society; that there are thousands of persons in this State who are regularly beaten, tortured and in some cases even killed by their spouses or cohabitants; . . . and that children, even when they are not themselves physically assaulted, suffer deep and lasting emotional effects from exposure to domestic violence. *It is therefore, the intent of the Legislature to assure the victims of domestic violence the maximum protection from abuse the law can provide.*
>
> * * *
>
> The Legislature further finds and declares that even though many of the existing criminal statutes are applicable to acts of domestic violence, *previous societal attitudes concerning domestic violence have affected the response of our law enforcement and judicial systems, resulting in these acts receiving different treatment from similar crimes when they occur in a domestic context. . . .*
>
> It is the intent of the Legislature to stress that *the primary duty of a law enforcement officer when responding to a domestic violence call is to enforce the laws allegedly violated and to protect the victim. . . .* It is further intended that the official response to domestic violence shall communicate

> the attitude that violent behavior will not be excused or tolerated, and shall make clear the fact that the existing criminal laws and civil remedies created under this act will be enforced without regard to the fact that the violence grows out of a domestic situation.

N.J. STAT. ANN. § 2C:25-18 (emphases added). Similarly, Colorado's legislature indicated a definitive intent to impose mandatory obligations on the police and others involved in the criminal justice system who deal with domestic violence:

> First of all, . . . the entire criminal justice system must act in a consistent manner, which does not now occur. *The police must make probable cause arrests.* The prosecutors must prosecute every case. Judges must apply appropriate sentences, and probation officers must monitor their probationers closely. And the offender needs to be sentenced to offender-specific therapy.
>
> *So this means the entire system must send the same message and enforce the same moral values, and that is abuse is wrong and violence is criminal.* And so we hope that House Bill 1253 starts us down this road.

Gonzales, 366 F.3d at 1107 (quoting Tr. of Colorado House Judicial Committee Hearings on House Bill 1253, Feb. 15, 1994, at 3) (emphases added). The passage of mandatory arrest laws, in Colorado and elsewhere, represents a significant step in the right direction.

The mere act of arrest communicates to the abuser and declares to society that domestic violence is a crime that will

be punished and no longer tolerated. Hoctor, *supra*, 85 CAL. L. REV. at 659. In this regard, "[m]andatory arrest is a crucial step to criminalizing domestic violence." Wanless, *supra*, 1996 U. ILL. L. REV. at 537. Moreover, mandatory arrest clarifies the role of police in domestic violence cases and helps guarantee victims some response from the criminal justice system. *Id.* at 547. Mandatory arrest laws force police officers to take domestic violence and violation of protective orders seriously and to protect victims, something they failed to do for centuries. Epstein, *supra*, 43 WM. & MARY L. REV. at 1865; *see also* Buel, *supra*, 11 HARV. WOMEN'S L. J. at 220-224 (identifying benefits of mandatory arrest).

Since their emergence, mandatory arrest laws have been credited with improving police responsiveness to domestic violence around the country. *See* Goodmark, *supra*, 23 ST. LOUIS U. PUB. L. REV. at 15 (citing statistics). One of the most significant areas in which mandatory arrest policies have begun to make a difference is in the enforcement of civil protective orders. Hagan, *supra*, 50 DEPAUL L. REV. at 977. This improvement is particularly compelling given that the "enforcement of protective orders is arguably the most important duty of the criminal justice system in combating domestic violence." *Id.* Notably, reports by the American Bar Association and Department of Justice have concluded that "[p]olice should assess the danger to children as well as to adults in the home, and mandatory arrest for violating orders of protection should include violations of provisions restricting contact between the perpetrator and his or her children." NATIONAL INST. OF JUSTICE, *supra*, A COORDINATED APPROACH, Appendix B at 35. Compliance with this directive would have served the Gonzales children well.

Conversely, the failure to arrest men who are abusing their partners or violating protective orders leaves victims fully exposed to the imminent threat of domestic violence and serves to reinforce abusers' belief that their conduct is acceptable. *See* Truss, *supra*, 26 ST. MARY'S L. J. at 1190. "Men ... [get] the message from police officers that woman battering is not a crime and that the sanctions of the criminal justice system – sanctions which presumably exist to deter and punish those who have the inclination to behave in antisocial ways – are routinely not invoked by police officers and that therefore they have nothing to fear if they beat the women with whom they are, or were, involved." Donna M. Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133, 1148 (1994) (quoting Eva Jefferson Paterson, *How the Legal System Responds to Battered Women*, in BATTERED WOMEN 79, 82-83 (Donna M. Moore ed., 1979)). Without mandatory arrest, victims of domestic violence will be at the mercy of a responding officer's particular views and prejudices regarding arrest and enforcement of the law. Wanless, *supra*, 1996 U. ILL. L. REV. at 547.

In this case, the Castle Rock Police Department failed to honor Colorado's legislative mandate to treat domestic violence as the crime that it is. The Tenth Circuit Court of Appeals' decision reaffirms to society and to law enforcement that domestic violence and the violation of protective orders *are* grievous crimes that must be treated accordingly. A reversal of the Tenth Circuit's decision in this case will undermine the very purpose for which protective orders and mandatory arrest laws were implemented and dismantle the rights and remedies that the Colorado legislature so meticulously pieced together in the protection of battered women and their children. A reversal of the Tenth Circuit's

decision will, in effect, be a reversal of the strides this country has made in the continuing campaign against domestic violence.

CONCLUSION

"The single greatest source of assistance that the judicial system can offer is enforcement of the laws designed to protect victims from further abuse and violence." Truss, *supra*, 26 ST. MARY'S L. J. at 1201-02. Following years of nonintervention – even condonation – by society, the courts, and the police, mandatory arrest laws were passed to ensure the enforcement of protective orders and the safety of battered women and children. Indeed, they were enacted to combat the very indifference that the Castle Rock Police Department demonstrated here. Mandatory arrest must be preserved as the foundation for an effective criminal justice system that affords victims of domestic violence the fundamental rights they were denied for centuries and have struggled so hard to attain. For the foregoing reasons, the decision of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

NAOMI G. BEER
Counsel of Record
LIBBY Y. MOTE
MICHELE E. STONE
GREENBERG TRAURIG, LLP
The Tabor Center
1200 Seventeenth Street
Suite 2400
Denver, Colorado 80202
(303) 572-6500

Counsel for National Coalition Against Domestic Violence and *National Center for Victims of Crime*

Supreme Court, U.S.
FILED
FEB 10 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO,
Petitioner,
v.
JESSICA GONZALES, INDIVIDUALLY AND AS NEXT BEST FRIEND OF HER DECEASED MINOR CHILDREN, REBECCA GONZALES, KATHERYN GONZALES, AND LESLIE GONZALES,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF *AMICI CURIAE* OF NATIONAL NETWORK TO END DOMESTIC VIOLENCE, NATIONAL NETWORK TO END DOMESTIC VIOLENCE FUND, COLORADO COALITION AGAINST DOMESTIC VIOLENCE,
(CONTINUED ON INSIDE COVER)

IN SUPPORT OF RESPONDENT

Fernando R. Laguarda*
Kristen S. Scammon
M. Elizabeth Gomperz
Lisa M. Palin
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300
Counsel for Amici Curiae

February 10, 2005

*Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

ALABAMA COALITION AGAINST DOMESTIC VIOLENCE, ALASKA NETWORK ON DOMESTIC VIOLENCE AND SEXUAL ASSAULT, ARIZONA COALITION AGAINST DOMESTIC VIOLENCE, ARKANSAS COALITION AGAINST DOMESTIC VIOLENCE, CALIFORNIA ALLIANCE AGAINST DOMESTIC VIOLENCE, CONNECTICUT COALITION AGAINST DOMESTIC VIOLENCE, D.C. COALITION AGAINST DOMESTIC VIOLENCE, DELAWARE COALITION AGAINST DOMESTIC VIOLENCE, DWA FANM, FLORIDA COALITION AGAINST DOMESTIC VIOLENCE, GEORGIA COALITION AGAINST DOMESTIC VIOLENCE, HAWAII STATE COALITION AGAINST DOMESTIC VIOLENCE, IDAHO COALITION AGAINST SEXUAL AND DOMESTIC VIOLENCE, ILLINOIS COALITION AGAINST DOMESTIC VIOLENCE, INDIANA COALITION AGAINST DOMESTIC VIOLENCE, INC., IOWA COALITION AGAINST DOMESTIC VIOLENCE, KANSAS COALITION AGAINST SEXUAL AND DOMESTIC VIOLENCE, KENTUCKY DOMESTIC VIOLENCE ASSOCIATION, LOUISIANA COALITION AGAINST DOMESTIC VIOLENCE, MAINE COALITION TO END DOMESTIC VIOLENCE, MARYLAND NETWORK AGAINST DOMESTIC VIOLENCE, JANE DOE, INC. -- MASSACHUSETTS COALITION AGAINST SEXUAL ASSAULT AND DOMESTIC VIOLENCE, MICHIGAN COALITION AGAINST DOMESTIC AND SEXUAL VIOLENCE, MINNESOTA COALITION FOR BATTERED WOMEN, MISSISSIPPI COALITION AGAINST DOMESTIC VIOLENCE, MISSOURI COALITION AGAINST DOMESTIC VIOLENCE, MONTANA COALITION AGAINST DOMESTIC AND SEXUAL VIOLENCE, NATIONAL CENTER ON DOMESTIC AND SEXUAL VIOLENCE, NEBRASKA DOMESTIC VIOLENCE SEXUAL ASSAULT

COALITION, NEVADA NETWORK AGAINST DOMESTIC VIOLENCE, NEW HAMPSHIRE COALITION AGAINST DOMESTIC AND SEXUAL VIOLENCE; NEW JERSEY COALITION FOR BATTERED WOMEN, NEW MEXICO COALITION AGAINST DOMESTIC VIOLENCE, NEW YORK STATE COALITION AGAINST DOMESTIC VIOLENCE, NORTH CAROLINA COALITION AGAINST DOMESTIC VIOLENCE, NORTH DAKOTA COUNCIL ON ABUSED WOMEN'S SERVICES, OHIO DOMESTIC VIOLENCE NETWORK, OKLAHOMA COALITION AGAINST DOMESTIC VIOLENCE AND SEXUAL ASSAULT, OREGON COALITION AGAINST DOMESTIC AND SEXUAL VIOLENCE, PENNSYLVANIA COALITION AGAINST DOMESTIC VIOLENCE, RHODE ISLAND COALITION AGAINST DOMESTIC VIOLENCE, SOUTH CAROLINA COALITION AGAINST DOMESTIC VIOLENCE AND SEXUAL ASSAULT, SOUTH DAKOTA COALITION AGAINST DOMESTIC VIOLENCE AND SEXUAL ASSAULT, TENNESSEE COALITION AGAINST DOMESTIC AND SEXUAL VIOLENCE, TEXAS COUNCIL ON FAMILY VIOLENCE, UTAH DOMESTIC VIOLENCE COUNCIL, VERMONT NETWORK AGAINST DOMESTIC AND SEXUAL VIOLENCE, VIRGINIA SEXUAL AND DOMESTIC VIOLENCE ALLIANCE, WASHINGTON STATE COALITION AGAINST DOMESTIC VIOLENCE, WEST VIRGINIA COALITION AGAINST DOMESTIC VIOLENCE, WISCONSIN COALITION AGAINST DOMESTIC VIOLENCE and WYOMING COALITION AGAINST DOMESTIC VIOLENCE AND SEXUAL ASSAULT.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. JESSICA GONZALES REASONABLY RELIED ON A COURT ORDER THAT FULFILLED COLORADO'S COMMITMENT TO SAFEGUARD HER AND HER CHILDREN AGAINST THE LIKELIHOOD OF FURTHER VIOLENCE 5

A. Protective Orders Are Intended To Safeguard Victims From Further Violence And Cannot Accomplish Their Purpose If Petitioner's Interpretation Is Accepted 7

B. The Federal Government Supports The Use Of Protective Orders As Contemplated By Colorado And A Majority Of The States 17

II. FAILING TO ENFORCE PROTECTIVE ORDERS INCREASES THE RISK OF VIOLENCE AND REDUCES THE LIKELIHOOD THAT ORDERS WILL BE SOUGHT 19

A. Protective Orders Are Intended To Curtail Additional Violence 22

B. Mandatory Enforcement Of Protective Orders Reduces Subsequent Violence 25

C. Failure To Enforce Protective Orders Enhances The Likelihood Of Additional Violence 28

III. CONCLUSION 30

APPENDIX A-1

TABLE OF AUTHORITIES

FEDERAL CASES

Alabama v. Bozeman,
533 U.S. 146 (2001) 7

Board of Regents v. Roth,
408 U.S. 564 (1972) 9

Colautti v. Franklin,
439 U.S. 379 (1979) 9

Conley v. Gibson,
355 U.S. 41 (1957) 21

Gonzales v. City of Castle Rock,
366 F.3d 1093 (10th Cir. 2004) 4, 5, 7, 24, 29

Hamdi v. Rumsfeld,
542 U.S. __, 124 S.Ct. 2633 (2004) 26

Hishon v. King & Spalding,
467 U.S. 69 (1984) 21

Kungys v. United States,
485 U.S. 759 (1988) 9, 10

Lavin v. Thornton,
959 F. Supp. 181 (S.D.N.Y. 1997) 10

Mallard v. U.S. Dist. Court,
490 U.S. 296 (1989) 7

New State Ice Co. v. Liebmann,
285 U.S. 262 (1932) 10

Santosky v. Kramer,
455 U.S. 745 (1982) 9, 10

Smith v. United States,
508 U.S. 223 (1993) 7

Swierkiewicz v. Sorema N.A.,
534 U.S. 506 (2002) 21

United States v. Bonanno,
146 F.3d 502 (7th Cir. 1998) 10

United States v. Harrison,
461 F.2d 1209 (D.C. Cir. 1972) 23

STATE CASES

Mastroianni v. County of Suffolk,
91 N.Y.2d 198 (1997) 28

BRIEFS

Town of Castle Rock v. Gonzales,
(No. 04-278) 16, 29

FEDERAL STATUTES

42 U.S.C. § 3796 18

18 U.S.C. § 922 18
§ 2261 18
§ 2262 18
§ 2265 18

18 USC §§ 2265 - 2266 15

28 U.S.C. § 534 (2004) 14

VAWA, Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (codified in Titles 8, 18, and 42 U.S.C.), *reauthorized by* Pub.L. 106-386, Div. B, Title I, §§ 1105, 1106, Title II, § 1209, Title IV, §§ 1401(b), 1407, 114 Stat. 1494, 1497, 1513, 1517 (2000) 17

Sup. Ct. R. 37.3(a) 2

Sup. Ct. R. 37.6 2

STATE STATUTES

Ala. Code § 15-10-3 (2004) 12
§§ 30-5-1 to -11 (1998 & Supp. 2004) 11
§ 30-5-4 15
§ 30-5A-1 to -7 11
§ 30-5A-4 12
§ 30-5B-1 to -10 ..... 11, 14
§ 30-5B-3 to -5 15

Alaska Stat. § 11.56.740 (Michie 2004) 12
§ 18.65.530 13
§ 18.65.540 14
§§ 18.66.100 - .180 11
§ 18.66.140 15

Ariz. Rev. Stat. Ann. § 13-3602 (West 2001 & Supp. 2004) 11, 12, 14, 15
§ 13-2810 12

Ark. Code Ann. § 5-53-134 (Michie Supp. 2003) 12, 15
§§ 9-15-201 to -216 (Michie 2002 & Supp. 2003 11

§ 9-15-207 12
§ 9-15-302 15
§ 12-12-215 (Michie 2003) 14

Cal. Fam. Code §§ 6200 - 6409 (Deering 1996 & Supp. 2005) 11
§ 6380 (Deering 2005) 14
§ 6388 (Deering 1996) 12
§§ 6401 - 6403 (Deering 2005) 15

Cal. Penal Code § 836 (Deering Supp. 2005) 12, 13

Colo. Rev. Stat. §§ 13-14-101 to -104 (2004) 11
§ 13-14-102 ..... 7, 8, 23, 25
§ 13-14-104 15
§ 18-6-800.3 8
§ 18-6-803.5 ..... 8, 9, 12, 13 17
§ 18-6-803.7 ..... 8, 14

Conn. Gen. Stat. §§ 46b-15 to-16 (2003) 11
§ 46b-15a 15
§ 46b-38c 11
§ 51-5c 14
§ 53a-107 12
§ 53a-223 12
§ 53a-223b 12

Del. Code Ann. tit. 10 §§ 1041 - 1053 (1999 & Supp. 2004) 11
§ 1046 ..... 12, 13, 14
§ 1049B 15
§ 1049C 15

D.C. Code Ann. §§ 16-1001 to -1006 (2001 & Supp. 2004) 11
§ 16-1005 (Supp. 2004) 12

§ 16-1041 to 1048 ..... 11, 15
§ 16-1044 14

Fla. Stat. ch. 741.28 - .315 (2004) 11, 15
ch. 741.30 14
ch. 741.31 12
ch. 741.315 15
ch. 901.15 12

Ga. Code Ann. §§ 19-13-3 to -6 (2004) 11
§ 19-13-6 12
§ 19-13-52 14
§ 19-13-54 (2004) 15

Haw. Rev. Stat. §§ 586-1 to -11 (1993 & Supp. 2003) 11
§ 586-10 14
§ 586-11 12
§§ 586-21 to -26 11
§ 586-21 15
§ 586-22 15
§ 586-24 15

Idaho Code §§ 39-6301 - 6316 (Michie 1998 & Supp. 2001) 11
§ 39-6306A (Michie Supp. 2001) 15
§ 39-6311 (Michie Supp. 2001) 14
§ 39-6312 (Michie Supp. 2001) 12

725 Ill. Comp. Stat. 5/112A-1 to -31 (2002 & Supp. 2003) 11
5/112A-23 (Supp. 2003) 12, 15
750 Ill. Comp. Stat. 60/101 to /104 (2002 & Supp. 2003) 11
750 Ill. Comp. Stat. Ann. 60/223 (Supp. 2003) 12, 15
60/302 (Supp. 2003) 14

Ind. Code Ann. § 5-2-9-5 (Michie Supp. 2004) 14
§§ 34-26-5-1 to -19 11
§ 34-26-5-17 15
§ 34-26-5-18 14
§ 35-46-1-15.1 (Michie 2004) 12
§ 35-46-1-20 15

Iowa Code §§ 236.3 - .11 (2003) 11
§ 236.8 12
§ 236.11 13
§ 236.18 11
§ 236.19 ..... 11, 15

Kan. Stat. Ann. § 21-3843 (Supp. 2003) 15
§§ 60-3101 to -3112 (1994 & Supp. 2003) 11
§ 60-3107 12
§ 60-3112 14

Ky. Rev. Stat. Ann. §§ 403.720 -.785 (LEXIS through 2004 Extraordinary Session) 11
§ 403.737 14
§ 403.760 ..... 12, 13
§ 403.763 12
§ 403.770 14
§ 403.7521 15
§ 403.7527 15
§ 403.7529 15

La. Rev. Stat. Ann. §14.79 (2004) 12, 15
§ 46:2131 - :2143 (West 1999 & Supp. 2005) 11
§ 46:2136 15
§ 46:2136.2 14
§ 46:2137 (West Supp. 2005) 12

Mass. Gen. Laws ch. 209A §§ 1 - 10 (2002 & Supp. 2003) 11
§§ 3A, 7 12
§ 5 (2002) 14
§ 5A (2002) 15
§ 6 (2002) 13

Me. Rev. Stat. Ann. tit. 15, § 321 (West 1998) 12, 15
tit. 16, § 631(4-B) (West Supp. 2004) 14
tit. 19-A, § 4001 25
tit. 19-A, §§ 4001 - 4014 (West 1998 & Supp. 2004) 11
tit. 19-A, § 4011(West 1998 & Supp. 2004) 12, 15
tit. 19-A, § 4012 13

Md. Code Ann., Crim. Proc. § 2-305 (2005) 14
Cts. & Jud. Proc. § 3-1501 to -1509 (2002 & Supp. 2003) 11
Cts. & Jud. Proc. § 3-1508 (Supp. 2003) 12, 13
Fam. Law § 4-501 to -511 (1999 & Supp. 2003) 11
Fam. Law § 4-508.1 (Supp. 2003) 15
Fam. Law § 4-509 (Supp. 2003) 12, 13

Mich. Comp. Laws Ann. §§ 600.2950 - .2950m (West Supp. 2004) 11
§ 600.2950(10, 17, 20) 14
§§ 600.2950(23), 764.15b 12
§§ 600.2950j - .2950l 15

Minn. Stat. § 518B.01 (2002) 11
subd. 13 14
subd. 14 ..... 12, 15
subd. 14(e) 13

Miss. Code Ann.§§ 93-21-1 to -29 (2004) 11
§ 93-21-13 15

§ 93-21-16 15
§ 93-21-21 (2004), ... 12
§ 99-3-7 (Supp. 2004) 12, 13

Mo. Ann. Stat. §§ 455.005 - .085 (West 2003 & Supp. 2004) 11
§ 455.040 (West 2003) 14
§ 455.067 (West 2003) 15
§ 455.085 (West 2003) 12, 13

Mont. Code Ann. §§ 40-15-101 to -408 (2003) 11
§ 40-15-204 12
§ 40-15-303 14
§§ 40-15-402 to -404 15
§ 45-5-626 12

Neb. Rev. Stat. §§ 42-901 to -940 (1998 & Supp. 2002, 2003) 11
§ 42-924 (Supp. 2002) 12
§ 42-928 (1998) 12, 13
§§ 42-933 to -935 (Supp. 2003) 15

Nev. Rev. Stat. §§ 33.017 - .100 (2003) 11
§ 33.070 ..... 12, 13
§ 33.085 15
§ 33.095 14
§ 179A.350 14

N.H. Rev. Stat. Ann. § 173-B:1-14 (2001 & Supp. 2004) 11
§ 173-B:4 (2001) 14
§ 173-B:9 (2001 & Supp. 2004) 12, 13
§ 173-B:13 (2001) 15

N.J. Stat. Ann. § 2C:25-18 (West Supp. 2004) 25
§ 2C:25-28 11

§ 2C:25-31 ..... 12, 13
§ 2C:25-34 14

N.M. Stat. Ann. §§ 40-13-3 to -6 (McKinney 2004 & Supp. 2005) 11
§ 40-13-6 (McKinney 1999) 12, 13,15

N.Y. Crim. Proc. Law § 140.10 (McKinney 2004 & Supp. 2005) 12, 13

N.Y. Exec. Law § 221-a (McKinney 2004 & Supp. 2005 14

N.Y. Fam. Ct. Act § 154-e (McKinney Supp. 2005) 15
§§ 841-842 (McKinney Supp. 2004) 11

N.C. Gen. Stat. §§ 50B-1 to -7 (1999 & Supp. 2004) 11
§ 50B-3 (2003) 14
§ 50B-4 (2003) 15
§ 50B-4.1 (2003) 12, 13

N.D. Cent. Code § 14-07.1-11 (2004) 13
§§ 14-07.1-01 - -18 11
§§ 14-07.1-10 - -11 12
§§ 14-07.4-01 - -03 15
§ 12-60-23 14

Ohio Rev. Code Ann. § 2919.272 (West Supp. 2004) 16
§ 2935.03 (West 1997 & Supp. 2004) 12
§ 3113.31 (West 1997 & Supp. 2004) 11, 14

Okla. Stat. Ann. tit. 22, §§ 60-60.14 (West 2004 & Supp. 2005) 11
§ 60.9 (West 2004) 12
§ 60.12 (West 2004) 16
§ 196 (West 2004) 12

Or. Rev. Stat. § 24.190 (2003) 15
§§ 107.700 - .732 11
§ 107.720 15
§ 133.310 ..... 12, 14

23 Pa. Cons. Stat. § 6104 (West 2001) 16
§ 6105 ..... 15, 16
§ 6108 (West 2001 & Supp. 2004) 11
§ 6109 15
§ 6113 ..... 12, 14

R.I. Gen. Laws §§ 8-8.1-1 to -8 (1997 & Supp. 2004) 11
§ 12-29-1.1 (2002) 16
§ 12-29-3 (2002) 12, 14
§ 12-29-8.1 (2002) 15

S.C. Code Ann. § 16-25-70 (Law Co-op 2003) 12, 14
§§ 20-4-10 to -140 (Law Co-op 1985 & Supp. 2004) 11
§ 20-4-140 (Law Co-op 2004) 16

S.D. Codified Laws § 23A-3-2.1 (Michie 1998 & Supp. 2003) 13, 14
§§ 25-10-1 to -13 (Michie 1999 & Supp. 2003) 11
§ 25-10-12 (Michie 1999) 15
§ 25-10-12.1 (Michie Supp. 2003) 16
§ 25-10-12.2 (Michie Supp. 2003) 15

Tenn. Code Ann. §§ 36-3-601 to -602 (2001 & Supp. 2004) 11
§ 36-3-609 (2004) 15
§ 36-3-611 (2001) 13, 14
§ 36-3-622 (2001) 16

Tex. Crim. Proc. Code Ann. § 14.03 (Vernon Supp. 2004-2005) 13, 14

Tex. Fam. Code Ann. §§ 85.021 - .026 (Vernon 2002) 11
§ 85.042 15
§§ 88.002 - .004 16

Tex. Gov't Code Ann. § 411.042 (Vernon Supp. 2004-2005) 15

Utah Code Ann. §§ 30-6-1 to -15 (1998 & Supp. 2004) 11
§ 30-6-8 (1998) 15
§ 30-6-12 (1998) 16
§ 53-10-208.1 (1998) 15
§ 77-36-2.4 (2003) 13, 14

Vt. Stat. Ann. tit. 15, §§ 1101 - 1115 (2002) 11
§ 1107 15
§ 1108 ..... 13, 15

Va. Code Ann. § 16-1-279.1 (Michie 2003 & Supp. 2004) 11, 15, 16
§ 19.2-81.3 (Michie 2004) 13

Wash. Rev. Code § 10.31.100 (2004) 13, 14
§ 26.50.110 ..... 13, 14
§§ 26.50.060 - .120 12
§§ 26.50.100 - .160 15
§ 26.52.010 16
§ 26.52.020 16
§ 26.52.070 16

W. Va. Code Ann. §§ 48-27-310 (Michie 2004) 15
§ 48-28-2 to -4 15

§§ 48-27-501 to -511 12
§ 48-27-802 15
§ 48-27-1001 ..... 13, 14

Wis. Stat. Ann. § 806.247 (West Supp. 2004) 16
§ 813.12 12,15
§§ 813.12 - .125 13,14

Wyo. Stat. Ann. § 7-20-102 (Michie 2003) 13
§§ 35-21-103 to -111 12
§ 35-21-109 16
§ 35-21-110 15

OTHER FEDERAL MATERIALS

Proclamation No. 7601, 67 Fed. Reg. 62, 169 (Oct. 1, 2002) 6

Proclamation No. 7717, 68 Fed. Reg. 59,079 (Oct. 8, 2003) 22

H.R. Rep. No. 103-395 (1993) 17

S. Rep. No. 101-545 (1990) 17, 18

S. Rep. No. 102-197 (1991) 17

S. Rep. No. 103-138 (1993) 17, 18

Violence Against Women: Victims of the System Before the Senate Comm. on the Judiciary, 102d Congress 253 (1991) (statement of Dr. Leslie Wolfe) 22

Cassandra Archer et al., U.S. Dep't of Justice, *National Evaluation of the Grants to Encourage Arrest Policies Program: Final Report* 5 (2002) 28

Open Letter from Attorney General and Secretary of Health and Human Services (undated), *at* http://toolkit.ncjrs.org/files/393409.pdf 19

Senator Joseph R. Biden, Jr., Subcommittee on Crime, Correction & Victims' Rights, *Ten Years of Extraordinary Progress: The Violence Against Women Act* (2004) 18, 20

Nat'l Ctr. for Injury Prevention & Control, Ctrs. for Disease Control, *Costs of Intimate Partner Violence Against Women in the United States* (2003) 22, 23

OTHER STATE MATERIALS

H.B. 04-1305, 2004 Colo. Legis. Serv. Ch. 178 § 2 (West) 7

N.J. Division of Criminal Justice, Office of the Attorney General, *Guidelines for the Enforcement of Out-of-State Restraining Orders or Orders of Protection in Domestic Violence Cases* (revised Sept. 2000), *at* http://www.njdcj.org/agguide/9dvout0.pdf 15

MISCELLANEOUS

Black's Law Dictionary 958 (abridged 6th ed. 1991) 7

Eve S. Buzawa & Carl G. Buzawa, *Domestic Violence: The Criminal Justice Response* 235 (3d ed. 2003) 23, 24, 27, 28

Colorado Coalition Against Domestic Violence, *Domestic Violence Facts and Statistics* 20

Colorado Coalition Against Domestic Violence, *Law Enforcement Training Manual* (2d ed. 2003) 20

Adele Harrell & Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims*, *in Do Arrests & Restraining Orders Work?* (Eve S. Buzawa & Carl Buzawa, eds. 1996) 24, 25

Julie A. Helling, *Specialized Criminal Domestic Violence Courts*, Violence Against Women Online Resources (no publication date), *at* http://www.vaw.umn.edu/documents/helling/helling.pdf 17

Victoria Holt et al., *Civil Protection Orders and Risk of Subsequent Police-Reported Violence*, J. Am. Med. Ass'n 589 (2002) 25

Carol E. Jordan, *Intimate Partner Violence and the Justice System*, J. Interpersonal Violence 1412 (2004) 27

Susan L. Keilitz et al., National Ctr. for State Courts, *Civil Protection Orders: The Benefits and Limitations for Victims of Domestic Violence* (1997) 21, 24, 25

Andrew R. Klein, *The Criminal Justice Response to Domestic Violence* (2004) 23, 29

Model Code on Dom. & Fam. Violence § 206 commentary (Nat'l Council Juv. & Fam. Ct. Judges 1994).....16

Joe Nelson, *Deputies Kill Husband Hours After Wife Killed in Highland; Woman Had Restraining Order Against Estranged Mate*, San Bernardino Sun, Jun. 8, 2004 29

Office of Violence Against Women, U.S. Dep't of Justice, *Grants to Encourage Arrest Policies and Enforcement of Protection Orders Program, at* http://www.ojp.usdoj.gov/vawo/arrest_grant_desc.htm.....19

Office of Violence Against Women, U.S. Dep't of Justice, *Chapter 3. Enhancing the Response of the Justice System: Civil Remedies, at* http://toolkit.ncjrs.org/vawo_3.html.....19

Office for Victims of Crime, U.S. Dep't of Justice, Legal Series Bulletin #4, *Enforcement of Protective Orders* (2002) 20, 25

Glenn Puit, *Orders Sometimes Not So Protective*, Las Vegas Review-Journal, Feb. 8, 1998, at 1B 27

Stephanie Riger & Susan Staggs, *The Impact of Intimate Partner Violence on Women's Labor Force Participation* (2004) 22

Mark Sauer, *Paper Weight: In Most Abuse Cases, Simple Restraining Orders Have a Positive*

Impact, but Sometimes They Trigger Violent Rage, San Diego Union-Tribune, Jan. 18, 2004, at E1.....26, 27

Gina Tenorio, *Spousal Violence Tackled*, San Bernadino Sun, Dec. 30, 2004.....29

Webster's Third New International Dictionary 2085 (15th ed. 1966) 7

INTEREST OF AMICI CURIAE

National Network to End Domestic Violence, National Network to End Domestic Violence Fund, Colorado Coalition Against Domestic Violence, Alabama Coalition Against Domestic Violence, Alaska Network On Domestic Violence And Sexual Assault, Arizona Coalition Against Domestic Violence, Arkansas Coalition Against Domestic Violence, California Alliance Against Domestic Violence, Connecticut Coalition Against Domestic Violence, D.C. Coalition Against Domestic Violence, Delaware Coalition Against Domestic Violence, Dwa Fanm, Florida Coalition Against Domestic Violence, Georgia Coalition Against Domestic Violence, Hawaii State Coalition Against Domestic Violence, Idaho Coalition Against Sexual And Domestic Violence, Illinois Coalition Against Domestic Violence, Indiana Coalition Against Domestic Violence, Iowa Coalition Against Domestic Violence, Kansas Coalition Against Sexual And Domestic Violence, Kentucky Domestic Violence Association, Louisiana Coalition Against Domestic Violence, Maine Coalition To End Domestic Violence, Maryland Network Against Domestic Violence, Jane Doe, Inc. -- Massachusetts Coalition Against Sexual Assault And Domestic Violence, Michigan Coalition Against Domestic And Sexual Violence, Minnesota Coalition For Battered Women, Mississippi Coalition Against Domestic Violence, Missouri Coalition Against Domestic Violence, Montana Coalition Against Domestic And Sexual Violence, National Center On Domestic And Sexual Violence, Nebraska Domestic Violence Sexual Assault Coalition, Nevada Network Against Domestic Violence, New Hampshire Coalition Against Domestic And Sexual Violence, New Jersey Coalition For Battered Women, New Mexico Coalition Against Domestic Violence, New York

State Coalition Against Domestic Violence, North Carolina Coalition Against Domestic Violence, North Dakota Council on Abused Women's Services, Ohio Domestic Violence Network, Oklahoma Coalition Against Domestic Violence And Sexual Assault, Oregon Coalition Against Domestic and Sexual Violence, Pennsylvania Coalition Against Domestic Violence, Rhode Island Coalition Against Domestic Violence, South Carolina Coalition Against Domestic Violence And Sexual Assault, South Dakota Coalition Against Domestic Violence and Sexual Assault, Tennessee Coalition Against Domestic And Sexual Violence, Texas Council On Family Violence, Utah Domestic Violence Council, Vermont Network Against Domestic And Sexual Violence, Virginia Sexual And Domestic Violence Alliance, Washington State Coalition Against Domestic Violence, West Virginia Coalition Against Domestic Violence, Wisconsin Coalition Against Domestic Violence and Wyoming Coalition Against Domestic Violence and Sexual Assault ("*Amici*") submit this brief in support of Respondent.* The interest of *Amici* is described in the Appendix to this brief.

---

* Pursuant to Sup. Ct. R. 37.3(a), all parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *Amici Curiae* state that no counsel for any party authored this brief in whole or in part and no person or entity, other than Amici *Curiae*, their members, or their counsel, made a monetary contribution to the preparation of this brief.

SUMMARY OF ARGUMENT

Her three young daughters are dead, but — according to the petitioner — Jessica Gonzales wasn't given a protective order, she was given a piece of paper telling her she could call her local police and warn them of impending trouble. The rest was up to them. According to petitioner, that is the only process she was due. Petitioner urges the Court to ignore plain language in both court order and statute, overlook the intent of the legislature, and override the reason and experience of state and federal governments that protective orders must be enforced or they enhance the risk of deadly violence rather than prevent it. Petitioner argues that *nothing about a protective order issued by a Colorado court*, with its express commitment of police enforcement — and nothing about Colorado law, with its clear mandates to law enforcement and repeated promises to protect victims of violence — actually means what it says. Although petitioner expresses sympathy with her plight and dismay at the senseless loss of three young lives, it claims Jessica Gonzales did not have a "due process" interest in the enforcement of her protective order. Petitioner is wrong.

Colorado law and the court order in this case created an entitlement for Jessica Gonzales in having her court-issued protective order enforced. The plain language of the statute and the court order are mandatory and imperative, and the discretion afforded law enforcement is a minimal threshold that was clearly met in this case. Public policy in Colorado and the combined reason and experience of a majority of states and the federal government strongly support a straightforward reading of the court order and state statutes that applied to Ms. Gonzales. Protective orders only work if they are enforced. They increase danger to victims if they are not.

If petitioner is correct, the discretion it claims police officers possess in the absence of due process safeguards would render Colorado's statutory scheme for protecting victims of domestic violence a nullity. Court-issued protective orders would become nothing more than a reminder that victims should ask for police help when they are in danger. If petitioner is correct, Ms. Gonzales and women like her should not trust the plain language of state law and court orders, but rely instead on the discretion of law enforcement — just as citizens without protective orders do. But unlike ordinary citizens without a protective order, a victim of domestic violence who seeks a protective order risks enhanced danger from her batterer. When law enforcement views a protective order as a mere suggestion, it enhances the likelihood of further violence.

Jessica Gonzales and her children "relied on the enforcement of the protective order entered in this case to go about their daily lives," as the Colorado legislature and state court manifestly intended they should.[1] Ms. Gonzales had a property interest that was violated without due process. Her claim should be allowed to proceed. The plain language of the statute and its underlying public policy are not empty vessels. For these reasons, the Court of Appeals for the Tenth Circuit correctly found that procedural due process claims could be brought against the Town of Castle Rock. Its decision should be AFFIRMED.

ARGUMENT

The protective order issued by the Colorado court to Jessica Gonzales created a property interest upon which she

[1] *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1110 (10th Cir. 2004) (en banc).

could reasonably rely.[2] This expectation is consistent with the language of the order, the circumstances under which it was issued, the policy of the State of Colorado, the policy of a majority of state governments, and the policy of the federal government. Legislatures and courts mandate police enforcement of protective orders to address the enhanced risks to life and safety that occur when these orders are issued. The Department of Justice itself plainly recognizes that protective orders only reduce the risk of further violence if the restrained party is convinced they will be enforced. Failure to enforce protective orders in the manner intended will increase the likelihood of separation violence and reduce the likelihood that battered women will seek protective orders for themselves and their children. The decision of the Court of Appeals for the Tenth Circuit is the only one consistent with state policy and the commitment made to Jessica Gonzales. For these reasons, its decision should be AFFIRMED.

I. JESSICA GONZALES REASONABLY RELIED ON A COURT ORDER THAT FULFILLED COLORADO'S COMMITMENT TO SAFEGUARD HER AND HER CHILDREN AGAINST THE LIKELIHOOD OF FURTHER VIOLENCE

Protective orders represent a commitment to safeguard victims and potential victims against violence. The majority of states have enacted laws similar to Colorado's, all intended to accomplish the same objectives. In fact, it is widely understood that violence frequently escalates following separation or when a victim is trying to separate

[2] As the Tenth Circuit properly held, it was the protective order issued to Jessica Gonzales that gave rise to her property interest, not any general obligation of the police to protect the public. *See id.* at 1099, 1103 (distinguishing *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989)).

from a batterer. Protective orders are emergency remedies designed to provide for immediate safety in those circumstances. For that reason, among others, the federal government itself encourages states to enforce their protective order regimes. In his public statement accompanying the October 2002 proclamation of National Domestic Violence Awareness Month, President Bush made it clear:

> We must continue to hold domestic abusers accountable; we must punish them to the full extent of the law; and we must prevent them from inflicting more abuse. Protective orders are helpful and can be enforced in every jurisdiction in our country, which means their power extends across State lines and onto tribal lands. This legal authority makes it easier for police and prosecutors to keep aggressors away from their intended targets. Many abusers become more dangerous after court-enforced separation from their victims and often use visitation or exchange of children as an opportunity to inflict abuse. We are working to expand programs that improve the safety of family members in these situations.[3]

If petitioner is correct, then the enactment of these laws and the issuance of court orders following notice and an opportunity to be heard by all parties is not only meaningless, it is in fact intended to produce an escalation of violence rather than a protective remedy. Such a result could not have been intended by the Colorado legislature and it cannot be countenanced by this Court.

[3] Proclamation No. 7601, 67 Fed. Reg. 62, 169 (Oct. 1, 2002).

A. Protective Orders Are Intended To Safeguard Victims From Further Violence And Cannot Accomplish Their Purpose If Petitioner's Interpretation Is Accepted

Jessica Gonzales had a claim of entitlement to the enforcement of her court-issued protective order. Mandatory enforcement of protective orders is a part of Colorado's comprehensive statutory scheme to prevent domestic violence.[4] The Colorado legislature recently confirmed "that the issuance and enforcement of protection orders are of paramount importance in the state of Colorado because protection orders promote safety, reduce violence, and prevent serious harm and death."[5] Domestic violence is defined in Colorado as "an act or *threatened act* of violence"

[4] Colo. Rev. Stat. § 13-14-102 (2004) (listing the duties a court *shall* fulfill when issuing a restraining order). The word "shall" in the Colorado statutes and court orders plainly bespeaks intent to command. *See Alabama v. Bozeman*, 533 U.S. 146, 153 (2001); *see also Mallard v. U.S. Dist. Court*, 490 U.S. 296, 301-02 (1989). Following dictionary definitions, the word "shall" is used in laws "to express what is mandatory." *Webster's Third New International Dictionary* 2085 (15th ed. 1966); *accord Black's Law Dictionary* 958 (abridged 6th ed. 1991) ("As used in statutes . . . ['shall'] is generally imperative or mandatory. . . . The word in ordinary usage means 'must' and is inconsistent with a concept of discretion."); *see also Smith v. United States*, 508 U.S. 223, 228 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."). The existence of the protective order, issued after notice and a hearing, consistent with the explicit policy of the State of Colorado for safeguarding against future violence, manifestly secures a benefit that supports a claim of entitlement under the Due Process Clause of the Fourteenth Amendment.

[5] H.B. 04-1305, 2004 Colo. Legis. Serv. Ch. 178 § 2 (West) (codified at Colo. Rev. Stat. § 13-14-102(1)). This clarifying amendment of July 1, 2004 confirms the understanding of the Tenth Circuit Court of Appeals. *See Gonzales*, 366 F.3d at 1107-08 (protective orders intended to be enforced to prevent domestic violence).

or any crime against a person or property "when used as a method of coercion, control, punishment, intimidation or revenge directed against a person with whom the actor is or has been involved in an intimate relationship."[6]

To further the purpose of "promot[ing] safety, reduce[ing] violence, and prevent[ing] serious harm and death,"[7] Colorado has authorized courts to issue protective orders[8] and has provided that violation of a protective order is a class 2 misdemeanor — a crime.[9] A central registry of protective orders facilitates police verification of these orders when responding to complaints of violation.[10] Police officers are required to make an arrest according to section 18-6-803.5(3) of the Colorado Revised Statutes as follows:

> (b) A peace officer *shall arrest, or*, if an arrest would be impractical under the circumstances, *seek a warrant for the arrest* of a restrained person when the peace officer has information amounting to probable cause that:
>
> (I) The restrained person has violated or attempted to violate any provision of a protection order; and
>
> (II) The restrained person has been properly served with a copy of the protection order or the restrained person has received

[6] Colo. Rev. Stat. § 18-6-800.3(1) (2004) (emphasis added).

[7] Colo. Rev. Stat. § 13-14-102(1) (effective July 1, 2004).

[8] *See id.* § 13-14-102(1.5) (effective July 1, 2004) (replacing *id.* § 13-14-102(1) (2003)).

[9] Colo. Rev. Stat. § 18-6-803.5(2)(a)(2004).

[10] *See id.* § 18-6-803.7.

> actual notice of the existence and substance of such order. (emphasis added)

Significantly, the Colorado legislature has determined that police officers who make an arrest pursuant to this section *cannot* be held civilly or criminally liable for the arrest if they were acting in good faith and without malice.[11] Conversely, police officers who fail to arrest are not protected from liability.

Colorado law and the court order issued to Ms. Gonzales leave law enforcement with the discretion solely to determine probable cause for violation or attempted violation of the protective order, and remove any need for the police to assess the danger to the victim or the benefit of arrest. Colorado law therefore creates a property interest that secures a specific benefit and supports a claim of entitlement to those benefits.[12] What petitioner suggests, in essence, is that the Court "cavalierly reject[] the considered judgment of the [Colorado] Legislature" that protective orders must be enforced as intended to safeguard against further violence. *Santosky v. Kramer*, 455 U.S. 745, 791 (1982) (Rehnquist, J., dissenting).

Indeed, the interpretation urged by petitioner, interposing total police discretion as to whether to enforce a court-issued protective order at all, would render the "shall arrest" language in protective orders and protective order enforcement statutes entirely superfluous and equate it with the more general "shall use every reasonable means to enforce" language therein, violating a "cardinal rule of statutory interpretation" that terms should not be construed to be redundant. *Kungys v. United States*, 485 U.S. 759, 778 (1988) (Scalia, J., plurality); *see also Colautti v. Franklin*,

[11] *See id.* § 18-6-803.5(5).

[12] *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

439 U.S. 379, 392 (1979) (an "elementary cannon of construction [is] that a statute should be interpreted so as not to render [parts] inoperative"). To say that protective orders merely give victims the same right every member of the public has to call the police and ask for help would "make[] nonsense of the statute." *Kungys*, 485 U.S. at 778. Such entirely "suggestive" protective orders would have the effect desired by the Colorado legislature "upon only the most dim-witted of prevaricators." *Id.* at 779. The tragic consequences of orders rendered meaningless in this manner are all too evident in the case of Jessica Gonzales.[13]

The policy determination made by the Colorado legislature is reflected by a majority of the states. State recognition of domestic violence as a critical problem and state enactment of strong protective order legislation represent an important national trend in this area. The states have an important role to play in preventing domestic violence, addressing its consequences, and protecting victims. *Cf. New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (recognizing importance of states as "laborator[ies]" of democracy). Indeed, the leadership role of states in this area is not in dispute. *Cf. Santosky*, 455 U.S. at 770 (the issue of domestic relations "has been left to the states since time immemorial").

---

[13] *Amicus* Solicitor General's argument that placement of language below the judge's signature on the protective order itself somehow renders it merely advisory is contrary to law and prior positions taken by the United States. *See, e.g., United States v. Bonanno*, 146 F.3d 502, 512 (7th Cir. 1998) (entire sentencing order entered by judge, including pre-printed boilerplate provisions, must be followed by defendant); *Lavin v. Thornton*, 959 F. Supp. 181, 191 (S.D.N.Y. 1997) (FBI agent entitled to rely on boilerplate language in consent to search form). The whole purpose of standardized language in protective orders is to ensure uniform enforcement state-wide, to provide a meaningful remedy to all victims, and not to neuter the very purpose for which the order is issued.

Every state has enacted legislation to authorize protective orders as a significant tool to prevent domestic violence.[14]

---

[14] Ala. Code §§ 30-5-1 to -11, 30-5A-1 to -7, 30-5B-1 to -10 (1998 & Supp. 2004); Alaska Stat. §§ 18.66.100 – .180 (Michie 2004); Ariz. Rev. Stat. Ann. § 13-3602 (West 2001 & Supp. 2004); Ark. Code Ann. §§ 9-15-201 to -216 (Michie 2002 & Supp. 2003); Cal. Fam. Code §§ 6200 – 6409 (Deering 1996 & Supp. 2005); Colo. Rev. Stat. §§ 13-14-101 to -104 (2004); Conn. Gen. Stat. §§ 46b-15 to -16 (2003), 46b-38c, *amended by* P.A. 03-202, 2003 Conn. Legis. Serv. § 5 (West); Del. Code Ann. tit. 10 §§ 1041 – 1053 (1999 & Supp. 2004); D.C. Code Ann. §§ 16-1001 to -1006, -1041 to -1048 (2001 & Supp. 2004); Fla. Stat. ch. 741.28- .315 (2004); Ga. Code Ann. §§ 19-13-3 to -6 (2004); Haw. Rev. Stat. §§ 586-1 to -11, -21 to -26 (1993 & Supp. 2003); Idaho Code §§ 39-6301 to -6316 (Michie 1998 & Supp. 2001); 725 Ill. Comp. Stat. 5/112A-1 to -31, 750 Ill. Comp. Stat. 60/101 to /104 (2002 & Supp. 2003); Ind. Code Ann. §§ 34-26-5-1 to -19 (Michie Supp. 2004); Iowa Code §§ 236.3 – .11, .18 – .19 (2003); Kan. Stat. Ann. §§ 60-3101 to -3112 (1994 & Supp. 2003); Ky. Rev. Stat. Ann. §§ 403.720 – .785 (LEXIS through 2004 Extraordinary Session); La. Rev. Stat. Ann. §§ 46:2131 – :2143 (West 1999 & Supp. 2005); Me. Rev. Stat. Ann. tit. 19-A, §§ 4001 – 4014 (West 1998 & Supp. 2004); Md. Code Ann., Cts. & Jud. Proc. §§ 3-1501 to -1509 (2002 & Supp. 2003); Md. Code Ann., Fam. Law §§ 4-501 to -511 (1999 & Supp. 2003); Mass. Gen. Laws ch. 209A §§ 1 – 10 (2002 & Supp. 2003); Mich. Comp. Laws Ann. §§ 600.2950 – .2950m (West Supp. 2004); Minn. Stat. § 518B.01 (2002); Miss. Code Ann.§§ 93-21-1 to -29 (2004); Mo. Ann. Stat. §§ 455.005 – .085 (West 2003 & Supp. 2004); Mont. Code Ann. §§ 40-15-101 to -408 (2003); Neb. Rev. Stat. §§ 42-901 to -940 (1998 & Supp. 2002, 2003); Nev. Rev. Stat. 33.017 - .100 (2003); N.H. Rev. Stat. Ann. § 173-B:1-14 (2001 & Supp. 2004); N.J. Stat. Ann. § 2C:25-28 to -35 (West Supp. 2004); N.M. Stat. Ann. §§ 40-13-3 to -6 (McKinney 2005); N.Y. Fam. Ct. Act. §§ 841-842 (McKinney Supp. 2004); N.C. Gen. Stat. §§ 50B-1 to -7 (1999 & Supp. 2004); N.D. Cent. Code §§ 14-07.1-01 to -18 (2004); Ohio Rev. Code Ann. § 3113.31 (West 2000 & Supp. 2004); Okla. Stat. Ann. tit. 22, §§ 60-60.14 (West 2004 & Supp. 2005); Or. Rev. Stat. §§ 107.700 to -.732 (2003); 23 Pa. Cons. Stat. § 6108 (West 2001 & Supp. 2004); R.I. Gen. Laws §§ 8-8.1-1 to -8 (1997 & Supp. 2004); S.C. Code Ann. §§ 20-4-10 to -140 (Law. Co-op 1985 & Supp. 2004); S.D. Codified Laws §§ 25-10-1 to -13 (Michie 1999 & Supp. 2003); Tenn. Code Ann. §§ 36-3-601 to -622 (2001 & Supp. 2004); Tex. Fam. Code Ann. §§ 85.021 – .026 (Vernon 2002); Utah Code Ann. §§ 30-6-1 to -15 (1998 & Supp. 2004); Vt. Stat. Ann. tit. 15, §§ 1101 – 1115 (2002); Va. Code Ann. § 16-1-279.1

Every state, including Colorado, has enacted criminal enforcement provisions or criminal sanctions for protective order violations to ensure that these orders are not merely pieces of paper but instead an important barrier between the victim and her abuser.[15] A majority of the states — thirty-

(Michie 2003 & Supp. 2004); Wash. Rev. Code §§ 26.50.060 – .120 (2004); W. Va. Code Ann. § 48-27-501 to -511 (Michie 2004); Wis. Stat. Ann. § 813.12 (West Supp. 2004); Wyo. Stat. Ann. §§ 35-21-103 to -111 (Michie 2003).

[15] Ala. Code §§ 15-10-3(2004), 30-5A-4 (1998); Alaska Stat. § 11.56.740 (Michie 2004); Ariz. Rev. Stat. Ann. §§ 13-3602(M), 13-2810 (West 2001 & Supp. 2004); Ark. Code Ann. § 5-53-134 (Michie Supp. 2003), § 9-15-207 (Michie 2002); Cal. Fam. Code § 6388 (Deering 1996), Cal. Penal Code § 836 (Deering Supp. 2005); Colo. Rev. Stat. Ann. § 18-6-803.5 (2004); Conn. Gen. Stat. §§ 53a-107, -223, -223b (2003); Del. Code Ann. tit. 10 § 1046 (Supp. 2004); D.C. Code Ann. § 16-1005(g) (Supp. 2004); Fla. Stat. ch. 741.31(4), 901.15(6) (2004); Ga. Code Ann. § 19-13-6 (2004); Haw. Rev. Stat. § 586-11 (Supp. 2003) (criminal punishment for protection order violation); Idaho Code § 39-6312 (Michie Supp. 2001); 725 Ill. Comp. Stat. 5/112A-23 (Supp. 2003); 750 Ill. Comp. Stat. Ann. 60/223 (Supp. 2003); Ind. Code Ann. § 35-46-1-15.1 (Michie 2004); Iowa Code § 236.8 (2003); Kan. Stat. Ann. § 60-3107(h) (Supp. 2003); Ky. Rev. Stat. Ann. § 403.760, .763 (LEXIS through 2004 Extraordinary Session); La. Rev. Stat. Ann. § 14.79 (2004), § 46-2137 (West Supp. 2005); Me. Rev. Stat. Ann. tit. 19-A, § 4011 (West 1998 & Supp. 2004), tit. 15 § 321(6) (West 2003); Md. Code Ann., Cts. & Jud. Proc. § 3-1508; Md. Code Ann., Fam. Law § 4-509 (Supp. 2003); Mass. Gen. Laws ch. 209A §§ 3A, 7 (2002 & Supp. 2003); Mich. Comp. Laws Ann. §§ 600.2950(23), 764.15b (West Supp. 2004); Minn. Stat. § 518B.01, subd. 14 (2002); Miss. Code Ann. § 93-21-21 (2004), § 99-3-7 (Supp. 2004); Mo. Ann. Stat. § 455.085(7) (West 2003); Mont. Code Ann. §§ 40-15-204, 45-5-626 (2003); Neb. Rev. Stat. § 42-924(2) (Supp. 2002), § 42-928 (1998); Nev. Rev. Stat. 33.070, .100 (2003); N.H. Rev. Stat. Ann. § 173-B:9 (2001 & Supp. 2004); N.J. Stat. Ann. § 2C:25-31 (West Supp. 2004); N.M. Stat. Ann. § 40-13-6 (McKinney 1999); N.Y. Crim. Proc. Law § 140.10 (McKinney 2004 & Supp. 2005); N.C. Gen. Stat. § 50B-4.1 (2003); N.D. Cent. Code §§ 14-07.1-10 to -11 (2004); Ohio Rev. Code Ann. § 2935.03 (West 1997 & Supp. 2004); Okla. Stat. Ann. tit. 22, §§ 60.9, 196 (West 2004); Or. Rev. Stat. § 133.310 (2003); 23 Pa. Cons. Stat. § 6113 (West 2001); R.I. Gen. Laws § 12-29-3 (2002); S.C. Code Ann. § 16-25-70 (Law. Co-op. 2003);

one, including Colorado — require arrest upon violation.[16] In addition, most states, again including Colorado, and the

S.D. Codified Laws § 23A-3-2.1 (Michie 1998 & Supp. 2003); Tenn. Code Ann. § 36-3-611 (2001); Tex. Crim. Proc. Code Ann. § 14.03 (Vernon Supp. 2004-2005); Utah Code Ann. § 77-36-2.4 (2003); Vt. Stat. Ann. tit. 15, § 1108 (2002); Va. Code Ann. § 19.2-81.3 (Michie 2004); Wash. Rev. Code §§ 10.31.100, 26.50.110 (2004); W. Va. Code Ann. § 48-27-1001 (Michie 2004); Wis. Stat. Ann. §§ 813.12 – .125 (West Supp. 2004); Wyo. Stat. Ann. § 7-20-102 (Michie 2003).

[16] Alaska Stat. § 18.65.530(a) (Michie 2004) ("a peace officer . . . shall arrest"); Cal. Penal Code § 836(c)(1) (Deering Supp. 2005) ("the officer shall . . . make a lawful arrest"); Colo. Rev. Stat. Ann. § 18-6-803.5(3)(b) (2004) ("[a] peace officer shall arrest"); Del. Code. Ann. tit. 10 § 1046 (Supp. 2004) ("[a] law enforcement officer shall arrest"); Iowa Code § 236.11 (2003); ("the peace officer shall take the person into custody"); Ky. Rev. Stat. Ann. § 403.760 (LEXIS through 2004 Extraordinary Session) ("Any peace officer . . . shall arrest the respondent without a warrant for violation of a protective order[.]"); Me. Rev. Stat. Ann. tit. 19-A, § 4012(5) (West 1998) ("[T]hat enforcement officer shall arrest and take into custody the alleged offender."); Md. Code Ann., Cts. & Jud. Proc. § 3-1508 ("[a] law enforcement officer shall arrest"); Md. Code Ann., Fam. Law § 4-509 (Supp. 2003) ("an officer shall arrest"); Mass. Gen. Laws ch. 209A § 6 (2002) ("The officer shall take . . . the following action: . . . arrest any person a law officer witnesses or has probable cause to believe has violated a temporary or permanent vacate, restraining, or no-contact order or judgment[.]"); Minn. Stat. § 518B.01, subd. 14(e) (2002) ("[a] peace officer shall arrest"); Miss. Code Ann. § 99-3-7(3)(a) (Supp. 2004) ("[a]ny law enforcement officer shall arrest"); Mo. Ann. Stat. § 455.085(2) (West 2003) ("the officer shall arrest the offending party-respondent"); Neb. Rev. Stat. § 42-928 (1998) ("[a] peace officer shall with or without a warrant arrest"); Nev. Rev. Stat. Ann. § 33.070 (2003) ("Every . . . order must include a provision ordering any law enforcement officer to arrest an adverse party[.]"); N.H. Rev. Stat. Ann. § 173-B:9 (2001 & Supp. 2004) ("[p]eace officers shall arrest the defendant"); N.J. Stat. Ann. § 2C:25-31 (West Supp. 2004) ("[T]he defendant shall be arrested and taken into custody by a law enforcement officer[.]"); N.M. Stat. Ann. § 40-13-6 (Michie 1999) ("[a] peace officer shall arrest"); N.Y. Crim. Proc. Law § 140.10 (McKinney 2004 & Supp. 2005) ("a police officer shall arrest"); N.C. Gen. Stat. § 50B-4.1 (2003) ("[a] law enforcement officer shall arrest"); N.D. Cent. Code § 14-07.1-11 (2004) ("[T]he law enforcement officer shall presume that arresting the person is the appropriate response."); Or. Rev. Stat. §

federal government have developed protective order databases to promote easier verification of orders by law enforcement officers.[17] Underscoring this policy of

133.310 (2003) ("[a] peace officer shall arrest"); 23 Pa. Cons. Stat. § 6113 (West 2001) ("[a] police officer shall arrest"); R.I. Gen. Laws § 12-29-3 (2002) ("the officer shall arrest"); S.C. Code Ann. § 16-25-70 (Law Co-op. 2003) ("[a] law enforcement officer must arrest" when physical injury is manifested); S.D. Codified Laws § 23A-3-2.1 (Michie 1998 & Supp. 2003) ("a law enforcement officer shall arrest"); Tenn. Code Ann. § 36-3-611 (2001) ("[a]ny law enforcement officer shall arrest the respondent"); Tex. Crim. Proc. Code Ann. § 14.03 (Vernon 1977 & Supp. 2004-2005) ("A peace officer shall arrest . . . if the offense is committed in the presence of the peace officer."); Utah Code Ann. § 77-36-2.4 (2003) ("[a] law enforcement officer shall, without a warrant, arrest"); Wash. Rev. Code § 10.31.100 (2004) ("[a] peace officer shall arrest"), § 26.50.110 (same); W. Va. Code Ann. § 48-27-1001 (Michie 2004) ("a law enforcement officer shall immediately arrest the respondent"); Wis. Stat. Ann. § 813.12 (West Supp. 2004) ("[a] law enforcement officer shall arrest"), § 813.125 ("[a] law enforcement officer shall arrest").

[17] 28 U.S.C. § 534(2) (2004); Ala. Code §§ 30-5B-1 to -10 (Supp. 2004); Alaska Stat. § 18.65.540 (Michie 2004); Ariz. Rev. Stat. § 13-3602(L) (West 2001 & Supp. 2004) (local registry); Ark. Code Ann. § 12-12-215 (Michie 2003); Cal. Fam. Code § 6380 (Deering 2005); Colo. Rev. Stat. § 18-6-803.7 (2004); Conn. Gen. Stat. Ann. § 51-5c (2003); Del. Code Ann. tit. 10, § 1046(b) (1999); D.C. Code Ann.§ 16-1044 (Supp. 2004); Fla. Stat. ch. 741.30(8)(b) (2004); Ga. Code Ann. § 19-13-52 (2004); Haw. Rev. Stat. § 586-10 (Supp. 2003); Idaho Code § 39-6311(2)(b) (Michie Supp. 2001); 750 Ill. Comp. Stat. 60/302 (2002); Ind. Code Ann. §§ 5-2-9-5, 34-26-5-18 (Michie Supp. 2004); Kan. Stat. Ann. § 60-3112 (Supp. 2003); Ky. Rev. Stat. Ann. §§ 403.737, 770 (LEXIS through 2004 Extraordinary Session); La. Rev. Stat. § 46:2136.2 (West Supp. 2005); Me. Rev. Stat. Ann. tit. 16, § 631(4-B) (West Supp. 2004); Md. Code Ann. Crim. Proc. § 2-305 (2005); Mass. Gen. Laws ch. 209A § 5 (2002); Mich. Comp. Laws Ann. § 600.2950(10, 17, 20) (West Supp. 2004); Minn. Stat. § 518B.01, subd. 13 (2002); Mo. Ann. Stat. § 455.040(3) (West 2003); Mont. Code Ann. § 40-15-303 (2003); Nev. Rev. Stat. §§ 33.095, 179A.350 (2003); N.H. Rev. Stat. Ann. § 173-B:4 IX(b) (2001); N.J. Stat. Ann. §§ 2C:34 (West Supp. 2004); N.Y. Exec. Law § 221-a (McKinney 2004 & Supp. 2005); N.C. Gen. Stat. § 50B-3(d) (2003); N.D. Cent. Code § 12-60-23 (2004); Ohio Rev. Code Ann. §

enforcement, every state has full faith and credit provisions requiring enforcement of orders issued in foreign states.[18]

3113.31(F)(2) (West 2000) (local registry); Or. Rev. Stat. § 107.720 (2003); 23 Pa. Cons. Stat. §§ 6105(e), 6109(b) (West 2001); R.I. Gen. Laws § 12-29-8.1 (2002); S.D. Codified Laws §§ 25-10-12 (Michie 1999), 12.2 (Michie Supp. 2003); Tenn. Code Ann. § 36-3-609 (2004); Tex. Fam. Code Ann. § 85.042(a) (Vernon 2002), Tex. Gov't Code Ann. § 411.042(b)(6) (Vernon Supp. 2004-2005); Utah Code Ann. §§ 30-6-8 (1998), 53-10-208.1 (2002); Vt. Stat. Ann. tit. 15 § 1107(b) (2002); Va. Code Ann. § 16.1-279.1(B) (Michie 2003); Wash. Rev. Code §§ 26.50.100 – .160 (2004); W. Va. Code Ann. § 48-27-802 (Michie 2004); Wis. Stat. Ann. § 813.12(6)(c) (West Supp. 2004); Wyo. Stat. Ann. § 35-21-110 (Michie 2003).

[18] 18 USC §§ 2265 – 2266; Ala. Code § 30-5-4(h), §§ 30-5B-3 to -5 (1998 & Supp. 2004); Alaska Stat. § 18.66.140(b) (Michie 2004); Ariz. Rev. Stat. § 13-3602(R) (West 2001 & Supp. 2004); Ark. Code Ann. §§ 9-15-302, 5-53-134(a)(2) (Michie Supp. 2003); Cal. Fam. Code §§ 6401 – 6403 (Deering 2005); Colo. Rev. Stat. § 13-14-104 (2004); Conn. Gen. Stat. § 46b-15a (2003), *as amended*, P.A. 03-98, 2003 Conn. Legis. Serv. (West); Del. Code Ann. Tit. 10 §§ 1049B & 1049C (Supp. 2004); D.C. Code Ann. §§ 16-1041 to -1043 (Supp. 2004); Fla. Stat. ch. 741.315 (2004); Ga. Code Ann. § 19-13-54 (2004); Haw. Rev. Stat. §§ 586-21, -22, -24 (Supp. 2003); Idaho Code §39-6306A (Michie Supp. 2001); 725 Ill. Comp. Stat. 5/112A-23, 750 Ill. Comp. Stat. 60/223 (Supp. 2003); Ind. Code Ann. § 34-26-5-17 (Michie Supp. 2004), § 35-46-1-20 (Michie 2004); Iowa Code § 236.19 (2003); Kan. Stat. Ann. § 21-3843 (Supp. 2003); Ky. Rev. Stat. Ann. §§ 403.7521, .7527, .7529 (LEXIS through 2004 Extraordinary Session); La. Rev. Stat. Ann. §§ 14:79(A)(2), 46:2136(C) (West Supp. 2005); Me. Rev. Stat. Ann. tit. 15, § 321(6), tit. 19-A, § 4011 (West 1998); Md. Code Ann., Fam. Law § 4-508.1 (Supp. 2003); Mass. Gen. Laws ch. 209A § 5A (2002); Mich. Comp. Laws Ann. §§ 600.2950j – .2950*l* (West Supp. 2004); Minn. Stat. § 518B.01, subd. 14 (2002); Miss. Code Ann. §§ 93-21-13, -16 (2004); Mo. Ann. Stat. § 455.067 (West 2003); Mont. Code Ann. §§ 40-15-402 to -404 (2003); Neb. Rev. Stat. §§ 42-933 to -935 (Supp. 2003); Nev. Rev. Stat. § 33.085 (2003); N.H. Rev. Stat. Ann. § 173-B:13 (2001), *amended by* 2001 N.H. Laws 189; N.J. Division of Criminal Justice, Office of the Attorney General, *Guidelines for the Enforcement of Out-of-State Restraining Orders or Orders of Protection in Domestic Violence Cases* (revised Sept. 2000), *at* http://www.njdcj.org/agguide/9dvout0.pdf; N.M. Stat. Ann. § 40-13-6(d) (Michie 1999); N.Y. Fam. Ct. Act § 154-e (McKinney Supp. 2005); N.C. Gen. Stat. § 50B-4 (2003); N.D. Cent. Code §§ 14-

These states have further determined that judges should determine whether a perpetrator is dangerous to his victim when deciding whether to grant a protective order, and that law enforcement need only decide if he has violated the court's order.[19]

The codification of criminal enforcement provisions in nearly all protective order statutes reflects the importance state legislatures place on using protective orders to place a barrier between the victim and her abuser in the form of arrest once the order has been violated but before further violence occurs.[20] Whether the statutes in these states require

---

07.4-01 to -03 (2004); Ohio Rev. Code Ann. § 2919.272 (West Supp. 2004); Okla. Stat. Ann. tit. 22, § 60.12 (West 2004); Or. Rev. Stat. § 24.190 (2003); 23 Pa. Cons. Stat. §§ 6104, 6105(h) (West 2001); R.I. Gen. Laws § 12-29-1.1 (2002); S.C. Code Ann. § 20-4-140 (Law. Co-op. Supp. 2004); S.D. Codified Laws § 25-10-12.1 (Michie Supp. 2003); Tenn. Code Ann. § 36-3-622 (2001); Tex. Fam. Code Ann. §§ 88.002 – .004 (Vernon 2002); Utah Code Ann. § 30-6-12 (1998); Vt. Stat. Ann. tit. 15, § 1108 (2002); Va. Code Ann. § 16.1-279.1(E) (Michie 2003); Wash. Rev. Code §§ 26.52.010, .020, .070 (2004); W. Va. Code Ann. §§ 48-27-310, 48-28-2 to -4 (Michie 2004); Wis. Stat. Ann. § 806.247 (West Supp. 2004); Wyo. Stat. Ann. § 35-21-109 (Michie 2003).

[19] Judges are in a unique and appropriate position to make the determination the legislatures envision. The National Council of Juvenile and Family Court judges issued a Model Code on Domestic and Family Violence in 1994. The enforcement provisions of this code are very similar to the enforcement provisions of the Colorado statutes. As part of the commentary to the section, the drafters of the model code state: "Research suggests that perpetrators are best deterred by swift and certain sanctions. Further support for the mandate stems from the conclusion of experts in the field that victims may refrain from seeking justice system intervention if perpetrators violate orders with impunity." Model Code on Dom. & Fam. Violence § 206 commentary (Nat'l Council Juv. & Fam. Ct. Judges 1994).

[20] Contrary to the suggestion of the Solicitor General as *amicus*, the existence of civil remedies does not, and should not, preclude or limit the criminal enforcement that the Colorado legislature has chosen to mandate. *See* Brief of *Amicus Curiae* United States Supporting Petitioner

or merely permit arrest upon violation, enforcement is considered an effective tool in combating domestic violence.[21] Strong enforcement of protective orders is essential to safeguarding battered women and their children.

B. The Federal Government Supports The Use Of Protective Orders As Contemplated By Colorado And A Majority Of The States

Like the states, the federal government has recognized the importance of strong protective order enforcement. The groundbreaking Violence Against Women Act of 1994 ("VAWA")[22] signaled Congress' recognition of domestic violence as a national problem. When considering VAWA, Congress heard ample evidence that protective orders are rendered ineffective by non-enforcement.[23] The legislative

---

at 25, *Town of Castle Rock v. Gonzales* (No. 04-278). While civil remedies are important, a mandate of criminal enforcement places a physical barrier, in the form of arrest, between the victim and her abuser, something that a civil remedy cannot provide. *See* Colo. Rev. Stat. § 18-6-803.5 ("The arrested person shall be removed from the scene of the arrest and shall be taken to the peace officer's station[.]").

[21] In addition to codifying strict enforcement of protective orders, many jurisdictions have established a form of specialized domestic violence courts, intending to create an area of expertise among judges and standardize court response to domestic violence cases. *See generally* Julie A. Helling, *Specialized Criminal Domestic Violence Courts*, Violence Against Women Online Resources (no publication date), *at* http://www.vaw.umn.edu/documents/helling/helling.pdf. Even in states without specialized courts, special attention has been paid to training judges on domestic violence and in the handling of protective orders and enforcement. *See generally id.*

[22] VAWA, Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (codified in Titles 8, 18, and 42 U.S.C.), *reauthorized by* Pub.L. 106-386, Div. B, Title !, §§ 1105, 1106, Title II, § 1209, Title IV, §§ 1401(b), 1407, 114 Stat. 1494, 1497, 1513, 1517 (2000).

[23] *See generally* S. Rep. No. 103-138 (1993); H.R. Rep. No. 103-395 (1993); S. Rep. No. 102-197 (1991); S. Rep. No. 101-545 (1990).

history of VAWA is replete with findings by Congress relating to the potential of protective orders to help battered women.[24] Through grants to states and local communities, Congress provides additional resources to help alleviate the burden of domestic violence complaints on police and prosecutors.[25] As a result of its investigations and work on this issue, Congress decided that any "burden" imposed on law enforcement by policies requiring enforcement of protective orders was one worth shouldering to protect victims of domestic violence and their children.[26]

---

[24] *E.g.*, S. Rep. No. 103-138, § I (VAWA intended to give victims "the assurance that their attackers will be prosecuted"), § III(A)(2) ("[T]itle II, recognizing the potency of protective orders as a remedy for domestic violence, closes a major loophole by requiring that each State honor the protective orders issued by other States."); S. Rep. No. 101-545 § III(Title II)(A)(3) (discussing benefits of pro-arrest policies and of civil protection orders, noting "novel legal remedies, such as the civil protection order, may suffer because of 'widespread lack of enforcement'").

[25] *See* S. Rep. No. 101-545 at 62.

[26] VAWA also established grants to encourage arrest policies and enforcement of protection orders, authorized at $65 million annually since VAWA's passage. *See* 42 U.S.C. § 3796hh ("The Attorney General may make grants . . . for the following purposes: (1) to implement mandatory arrest or proarrest programs and policies in police departments, *including mandatory arrest programs and policies for protection order violations*.") (emphasis added); *see also* Senator Joseph R. Biden, Jr., Subcommittee on Crime, Correction & Victims' Rights, *Ten Years of Extraordinary Progress: The Violence Against Women Act* 22-24 (2004) [hereinafter "Biden Report"]. VAWA also mandated the enforcement of protective orders across state lines, 18 U.S.C. § 2265 ("Any protection order issued...shall be accorded full faith and credit by the court of another State or Indian tribe . . . and enforced as if it were the order of the enforcing State or tribe."); created federal crimes for crossing state lines to commit domestic violence, § 2261, and for the interstate violation of protective orders, § 2262; and made restrained persons one of only nine categories of Americans banned from possessing firearms, § 922(g)(8).

The United States Department of Justice ("DOJ") has also taken the position that protective orders are a valuable tool, and that enforcement of orders is critical to the safety of women. In the application for VAWA's Arrest program grants, states seeking federal funds are informed that they must demonstrate commitment to protective order and other domestic violence law enforcement to qualify.[27] And in 2001, DOJ disseminated its detailed "Toolkit to End Violence Against Women" which addresses protective orders in Chapter 3.[28] The Toolkit encourages legislators, judges, court administrators, advocates and prosecutors to take specific concrete steps to increase enforcement of protective orders.

II. FAILING TO ENFORCE PROTECTIVE ORDERS INCREASES THE RISK OF VIOLENCE AND REDUCES THE LIKELIHOOD THAT ORDERS WILL BE SOUGHT

Jessica Gonzales' story is not unique. Every day, victims

---

[27] *See* Office of Violence Against Women, U.S. Dep't of Justice, *Grants to Encourage Arrest Policies and Enforcement of Protection Orders Program*, *at* http://www.ojp.usdoj.gov/vawo/arrest_grant_desc.htm. The Arrest program is intended to support programs that implement mandatory arrest programs and policies for enforcement of protection order violations, and priority given to applications which demonstrate a commitment to strong enforcement of laws, including protection orders from other jurisdictions. *See id.*

[28] *See* Office of Violence Against Women, U.S. Dep't of Justice, *Chapter 3. Enhancing the Response of the Justice System: Civil Remedies*, *at* http://toolkit.ncjrs.org/vawo_3.html; *see also* Open Letter from Attorney General and Secretary of Health and Human Services (undated), *at* http://toolkit.ncjrs.org/files/393409.pdf ("The recommendations and information contained in the *Toolkit* were the result of input from leaders and practitioners around the country with expertise in domestic violence . . . . Input was also provided by key individuals working in the areas of criminal justice . . . .").

of domestic violence are physically and emotionally harmed or even killed by their abusers. The statistics are daunting:

- Nearly one in every three women experiences at least one physical assault by a partner during adulthood.[29]

- On average, more than three women are murdered by their husbands or boyfriends in this country every day.[30]

- In Ms. Gonzales' home state of Colorado, the year 2003 ended with 51 domestic violence-related fatalities, three of which were children.[31]

- Conservative estimates suggest that at least 30% of batterers also abuse their children.[32]

Like Ms. Gonzales, many of those victims obtained civil protective orders against their abusers from state courts. But as the DOJ has stated, protective orders "are effective only when the restrained party is convinced the order will be enforced."[33]

Vigilant enforcement of protective orders can save already victimized women from further abuse or even death.

---

[29] Biden Report, *supra*, at 30.

[30] *Id.*

[31] Colorado Coalition Against Domestic Violence, *Domestic Violence Facts and Statistics* (citing Project Safeguard April 2004), *at* http://www.ccadv.org/facts.htm.

[32] Colorado Coalition Against Domestic Violence, *Law Enforcement Training Manual* § 1-4 (2d ed. 2003).

[33] Office for Victims of Crime, U.S. Dep't of Justice, Legal Series Bulletin #4, *Enforcement of Protective Orders* 1 (2002) [hereinafter "*Enforcement of Protective Orders*"].

While other factors such as criminal record and level of previous violence contribute to an abuser's likelihood to re-abuse his victim, a comprehensive study by the National Center for State Courts found that in Denver, where 87% of protective order violators were arrested, only 2% of women experienced re-abuse within six months of obtaining the order.[34] By comparison, in Delaware and the District of Columbia, where police arrested protective order violators only 55% and 41% of the time, respectively, 10.9% and 11.9% of women reported re-abuse.[35] When protective orders are properly enforced, law enforcement steps in after seemingly harmless conduct violates a judge's mandate, but *before* abusers have the opportunity to harm their victims. Each failure to enforce protective orders as intended by legislatures and courts gives an abuser an unnecessary opportunity to harm his victim. That is precisely the failure that cost Rebecca, Katheryn and Leslie Gonzales their lives. And it is a failure that will continue to produce such horrific results if police departments can deny the right to enforcement without due process in a systemic pattern and practice like that encountered by Jessica Gonzales.[36]

---

[34] *See* Susan L. Keilitz et al., National Ctr. for State Courts, *Civil Protection Orders: The Benefits and Limitations for Victims of Domestic Violence* 38, 61-62 (1997).

[35] *See id.*

[36] On a motion to dismiss, the Court must take the facts as alleged and give the non-moving party the benefit of every inference from those facts. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Dismissal is not appropriate unless "no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002); *accord Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (complaint should not be dismissed unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim"). Petitioner's attempts to supplement the record, or offer explanations or *post hoc* rationalizations for police conduct, are contrary to law.

A. Protective Orders Are Intended To Curtail Additional Violence

Protective orders and protective order enforcement statutes like Colorado's are an integral part of an effort to combat the devastating impact of domestic violence. While exposition of the full impact of domestic violence is not possible here, domestic violence "permeates every aspect of women's lives. It alters where women live, work and study as they try to be safe by staying within certain prescribed bounds."[37] As President George W. Bush has recognized, "approximately one-third of women who are murdered each year are killed by their current or former husband or partner."[38] And "[c]hildren who are subjected to domestic violence too often grow up to inflict violence on others."[39]

Aside from the initial physical injuries caused by violence, chronic domestic violence is associated with poor health, and can manifest itself as stress-related mental and physical health problems as long as a year after abuse has occurred.[40] The resulting impact on the labor force is well documented; abused women miss more work than women who are not abused, particularly in the days immediately following physical abuse.[41] Society bears the economic brunt

---

[37] *Violence Against Women: Victims of the System Before the Senate Comm. on the Judiciary*, 102d Congress 253 (1991) (statement of Dr. Leslie Wolfe).

[38] Proclamation No. 7717, 68 Fed. Reg. 59,079 (Oct. 8, 2003).

[39] *Id.*

[40] *See* Stephanie Riger & Susan Staggs, *The Impact of Intimate Partner Violence on Women's Labor Force Participation* 1 (2004) (submitted to the Nat'l Institute of Justice), http://www.ncjrs.org/pdffiles1/nij/grants/207143.pdf.

[41] The Centers for Disease Control estimates productivity losses resulting from domestic violence at $1.8 billion annually, as victims lose a total of nearly eight million days of paid work. *See* Nat'l Ctr. for Injury

of this epidemic, as the Centers for Disease Control reports that the health-related costs of domestic violence approach $4.1 billion every year.[42]

Civil protective orders can mitigate against future violence when properly issued and enforced. The orders are issued by general purpose or family courts, and rely on the court's civil, as opposed to criminal, powers.[43] As a result, they are designed to prevent future abuse, rather than punish for past abuse.[44] While specific procedures vary from state to state, most states allow victims to seek temporary orders on an *ex parte* basis. These orders are only effective for a short time, and permanent orders — usually lasting for six months to three years — are only entered after the abuser has an opportunity to be heard by the court.[45] Protective orders are not handed to victims as if they were receipts merely for showing up at the courthouse; victims must make a showing

---

Prevention & Control, Ctrs. for Disease Control, *Costs of Intimate Partner Violence Against Women in the United States* 26, 32 (2003).

[42] *Id.* at 2.

[43] *E.g.*, Colo. Rev. Stat.§ 13-14-102. Civil protective orders were first devised in the mid 1970s to safeguard victims of domestic violence because the criminal justice system had refused to apply existing criminal laws to domestic situations. Despite increased involvement of the criminal justice system in domestic violence situations, civil protective orders remain the primary means of judicial intervention against abusers in many jurisdictions. Andrew R. Klein, *The Criminal Justice Response to Domestic Violence* 67-68 (2004).

[44] Eve S. Buzawa & Carl G. Buzawa, *Domestic Violence: The Criminal Justice Response* 235 (3d ed. 2003) (citing Finn, 1989); *see also United States v. Harrison*, 461 F.2d 1209, 1211 (D.C. Cir. 1972) (recognizing that a civil protection order is "in the nature of an injunction to restrain future actions," not a "judgment that punishes the individual for a past crime").

[45] *See, e.g.*, Klein, *supra*, at 69.

of need for protection from a specific abuser, and convince a judge that the order should issue.[46]

Battered women do not seek protective orders lightly. Most victims only seek court intervention after suffering extreme abuse. One study revealed that 68% of women seeking a protective order had been victimized by violence on other past occasions.[47] The majority of women who seek temporary protection orders complain of serious abuse including physical assault, threats to kill or harm, or attempts or threats to take children.[48] Despite the magnitude of harm suffered by these victims, another study found that while 10% of its participants sought protective orders after only a week, and 15% had suffered for one to two years, nearly 25% had been abused for more than five years before finally seeking protection.[49]

Although protective orders are no panacea, battered women report feeling empowered by receiving them. One study found that victims interviewed one and six months after obtaining a protective order perceived that their well

---

[46] Contrary to the suggestion of Petitioner and some *amici* that Jessica Gonzales received nothing more than a pre-printed, standardized form protection order, Ms. Gonzales' order was issued by the court after Simon Gonzales had an opportunity to be heard by the judge. *See Gonzales*, 366 F.3d at 1097 (citing Aplt. Appx. at 29, 30). And it was that opportunity that led to the initial temporary order's modification to include provisions detailing Mr. Gonzales' parenting time with his daughters. *See id.*

[47] *See* Buzawa & Buzawa, *supra*, at 234 (citing Carlson, Harris & Holden 1999).

[48] *See* Adele Harrell & Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims, in Do Arrests & Restraining Orders Work?* 214, 216-17 (Eve S. Buzawa & Carl G. Buzawa, eds. 1996).

[49] *See* Keilitz, *supra*, at 90.

being had been positively affected.[50] Another study found that most women felt that their protective order was helpful in documenting the abuse, and 79% of those women reported that the order was helpful in sending her abuser a message that his actions were wrong.[51] Perhaps most importantly, a recent study published in the Journal of the American Medical Association found that battered women who obtained permanent protective orders experienced an 80% reduction in police-reported physical violence in the year following a violent episode.[52]

B. Mandatory Enforcement Of Protective Orders Reduces Subsequent Violence

The DOJ has stated the issue quite succinctly: "Unless protective orders are enforced, they can prove harmful to victims by creating a false sense of security."[53] The DOJ has quite plainly called for "[u]nequivocal, standardized enforcement of court orders."[54] State lawmakers echo these admonitions.[55] Unfortunately, victims are frequently lulled

---

[50] *See* Keilitz, *supra*, at 37-38.

[51] *See* Harrell & Smith, *supra*, at 218.

[52] Victoria Holt et al., *Civil Protection Orders and Risk of Subsequent Police-Reported Violence*, J. Am. Med. Ass'n 589, 593 (2002).

[53] *Enforcement of Protective Orders*, *supra*, at 5.

[54] *Id.* at 1.

[55] *E.g.*, Colo. Rev. Stat. § 13-14-102(1) ("The general assembly hereby finds that the issuance and enforcement of protection orders are of paramount importance in the state of Colorado because protection orders promote safety, reduce violence, and prevent serious harm and death."); Me. Rev. Stat. Ann. tit. 19-A, § 4001 (purposes of the Maine protective order statutory scheme include "provid[ing] protection by . . . diligently enforcing court orders that prohibit abuse" and "clarify[ing] the responsibilities and support the efforts of law enforcement officers, prosecutors and judicial officers to provide immediate, effective assistance and protection for victims of abuse and to recognize the crucial

into dangerous complacency, assuming the police will protect them if their abuser violates the order. A protective order may therefore actually enhance the danger it was designed to mitigate if it is not enforced.

Abusers intent on abusing may not be stopped by a piece of paper[56] but they will be stopped if police arrest them for violating the protective order during the crucial time period between the time of violation — often by contacting the victim on the phone or by coming within a certain distance of her — and the time that they get close enough to commit violence. The importance of enforcing protective orders as intended therefore cannot be overstated. As alleged by Ms. Gonzales, and tragically evident in the deaths of her three young daughters, there is a very real risk of police under-enforcement of protective orders. *Cf. Hamdi v. Rumsfeld*, 542 U.S. __, 124 S.Ct. 2633, 2647 (2004) (O'Connor, J., plurality) (noting importance of procedural due process to protect against mistaken deprivation of protected interest when the risks and consequences of mistaken deprivation are great).

---

role of law enforcement officers in preventing further incidents of abuse and in assisting the victims of abuse"); N.J. Stat. Ann. § 2C:25-18 ("It is the intent of this Legislature to stress that the primary duty of a law enforcement officer when responding to a domestic violence call is to enforce the laws allegedly violated and to protect the victim. . . . It is further intended that the official response to domestic violence shall communicate the attitude that violent behavior will not be excused or tolerated, and shall make clear the fact that the existing criminal laws and civil remedies created under this act will be enforced without regard to the fact that the violence grows out of a domestic situation.").

[56] As Judge Timothy Tower tells victims in his San Diego courtroom, "Look, this piece of paper is not bulletproof, and it's not knife-proof." Mark Sauer, *Paper Weight: In Most Abuse Cases, Simple Restraining Orders Have a Positive Impact, but Sometimes They Trigger Violent Rage*, San Diego Union-Tribune, Jan. 18, 2004, at E1.

Separation frequently heightens the risk of injury or death in an abusive relationship, a risk that can be alleviated only by issuance of a protective order followed by appropriate law enforcement intervention. Abusers often react violently to the issuance of a protective order barring them from contact with their victims, as well as to other forms of relationship termination. Studies have shown that murders of women often follow a recent attempt at or completion of separation by the victim from the abuser.[57] Studies have also shown that men who resist entry of a protective order or attempt to keep custody of children are far more likely to re-abuse.[58] News accounts of murder or serious abuse soon after an abuser is served with a protective order are all too familiar.

The case of Bill Hoffine, who sought out and murdered his fourteen-year old son soon after being served with a restraining order obtained by the boy's mother, is tragically similar to that of Jessica Gonzales.[59] Christian Walker killed his 17-year old girlfriend Maureen McConahan just weeks after she obtained a protective order against him, and after threatening that she would "have it a lot worse" if she didn't cancel the order.[60] This "separation violence" phenomenon highlights the need for enforcement of protective orders before the situation turns violent. It is unclear whether intervention would have saved these two victims, but where an abuser reacts violently to receiving an order, and police fail to respond to a victim's initial call for help, the danger of serious harm to the victim can only increase. If abusers see

---

[57] *See* Carol E. Jordan, *Intimate Partner Violence and the Justice System*, J. Interpersonal Violence 1412, 1415-16 (2004) (collecting sources).

[58] Buzawa & Buzawa, *supra*, at 243 (citing Harrell et al. 1993).

[59] Sauer, *supra*, at E1.

[60] Glenn Puit, *Orders Sometimes Not So Protective*, Las Vegas Review-Journal, Feb. 8, 1998, at 1B.

that the authorities do not take protective orders seriously, they are far more likely to adopt the same attitude. As other *amici* in support of Respondent explore in more detail, some women, like Jessica Gonzales, are unable to take certain safety measures, such as moving, because they are required to make their children available to their abuser pursuant to custody arrangements.

C. Failure To Enforce Protective Orders Enhances The Likelihood Of Additional Violence

Leading domestic violence researchers recently concluded after an exhaustive review of the data that protective orders' "ultimate efficacy is often greatly compromised when police fail to arrest or prosecutors refuse to prosecute restraining order violations."[61] A 2002 study commissioned by the DOJ found that domestic violence victims believed that protective orders were not an effective safety measure because of lack of enforcement.[62] It is not hard to find stories that show why:

- Adell Swiggett's husband killed her thirty minutes after police left the area despite being told he had violated a protective order by entering her home.[63]

- Five-year-old Brian Brown's father killed him with a shotgun after police failed to arrest him for violating a protective order prohibiting possession of a firearm

[61] Buzawa & Buzawa, *supra*, at 260.

[62] *See* Cassandra Archer et al., U.S. Dep't of Justice, *National Evaluation of the Grants to Encourage Arrest Policies Program: Final Report* 5 (2002).

[63] *See Mastroianni v. County of Suffolk*, 91 N.Y.2d 198, 201-02 (1997).

when they pulled him over for drunk driving and found the shotgun in his vehicle.[64]

- Toni Alicea's estranged husband stabbed her repeatedly in front of her 3-year old daughter less than three weeks after police failed to arrest him for violating a permanent protective order by stalking her, threatening her, and calling and emailing her.[65]

The improper and unauthorized exercise of police discretion leads to tragedy.

Judges issue protective orders after reviewing the facts and determining that an abuser is a danger to his victim. Permanent orders like that given to Jessica Gonzales are issued after the abuser has an opportunity to be heard in court.[66] A judge has already made the determination that the victim is at risk if the abuser does that which the order prohibits - regardless of whether the prohibited activity itself may seem otherwise innocuous. Police need only determine whether the abuser has violated the court-issued order, and arrest him if he has. Thus when an abuser is prohibited from coming within 100 feet of his victim, he should be arrested if he is within 99 feet of her. Far from the "absurd result" petitioner claims,[67] this is precisely the goal of protective orders and protective order enforcement statutes, because a

[64] *See* Klein, *supra*, at 76.

[65] Gina Tenorio, *Spousal Violence Tackled*, San Bernadino Sun, Dec. 30, 2004; Joe Nelson, *Deputies Kill Husband Hours After Wife Killed in Highland; Woman Had Restraining Order Against Estranged Mate*, San Bernardino Sun, Jun. 8, 2004.

[66] Simon Gonzales had an opportunity to be heard in court, and in fact obtained a revised protective order as a result. *See Gonzales*, 366 F.3d at 1097 (citing Aplt. Appx. at 29, 30).

[67] Petitioner's Opening Brief at 28, *Town of Castle Rock v. Gonzales* (No. 04-278).

batterer with hostile intent will not take long to travel 100 feet.

III. CONCLUSION

Colorado has made the judgment that victims are entitled to rely on police enforcement of court-issued protective orders. Petitioner evades and ignores the plain meaning of the statute and order to render the entire public policy at issue potentially dangerous to victims. When the legislature and courts have plainly required full enforcement, a domestic violence protective order creates an entitlement that cannot be taken away without due process. For the foregoing reasons, the decision of the Court of Appeals for the Tenth Circuit must be AFFIRMED.

Respectfully submitted,

Fernando R. Laguarda*
Kristen S. Scammon
M. Elizabeth Gomperz
Lisa M. Palin
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300
Counsel for Amici Curiae

February 10, 2005

*Counsel of Record

APPENDIX

INTEREST OF *AMICI CURIAE*

The following organizations respectfully submit this brief as *Amici Curiae* in support of the Respondent, and urge the Court to affirm the Tenth Circuit Court of Appeals decision in this case in favor of Jessica Gonzales.

The **National Network to End Domestic Violence (NNEDV)** is a not-for-profit organization incorporated in the District of Columbia in 1995 (www.nnedv.org). A network of state domestic violence coalitions, representing over 2,000 member programs nationally, NNEDV serves as the voice of battered women and their children and those who provide direct services to them. NNEDV is working with states and local communities to establish best practices for issuing and enforcing protection orders and to ensure that they are given full faith and credit from state to state. NNEDV chairs the Crimes and Courts subcommittee of the National Task Force to End Sexual and Domestic Violence Against Women. Along with local, state and national leaders in domestic violence and criminal justice issues, NNEDV is formulating new approaches and innovative legal solutions to ending domestic violence. NNEDV was instrumental to Congressional enactment and eventual implementation of the Violence Against Women Acts of 1994 and 2000 and has played a leading role in drafting the proposed Violence Against Women Act of 2005, including intensive work on the provisions regarding enforcement of protective orders across state lines.

The **National Network to End Domestic Violence Fund (NNEDV Fund)** is a not-for-profit organization incorporated in the District of Columbia in 1996 for the purposes of providing technical assistance, training and

public education to advocates, professionals and individuals who encounter battered women in their work and communities. NNEDV Fund has provided advice and expertise on domestic violence issues affecting battered women and their children to judges, attorneys, educators and state and local welfare, justice system personnel, and others working to end domestic violence. NNEDV Fund provides technical assistance to states as they work with police, judges and prosecutors to enforce protection orders. NNEDV Fund also collaborates with state and national domestic violence, law enforcement and other criminal justice organizations to provide training, outreach and standards for protection orders. NNEDV Fund is the leading national voice on the criminal justice response to victims of domestic violence.

The **Colorado Coalition Against Domestic Violence (CCADV)** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. CCADV has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services.

The **Alabama Coalition Against Domestic Violence (ACADV)** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. ACADV has extensive expertise on the physical, emotional and economic dangers women and their

families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services. ACADV has conducted significant training for judges, law enforcement an court clerks on protective orders; has actively sought and advocated for improvements to Alabama's protective order statue; has worked cooperatively with the Alabama Administrative Office of Courts to track protective orders; is currently working with the Alabama Administrative Office of Courts on an innovative on-line application process for protective orders; and has spear-headed a multi-state project to accord full faith and credit to foreign protective orders.

The **Alaska Network on Domestic Violence and Sexual Assault (ANDVSA)** is a non-profit organization representing domestic violence/sexual assault programs and individual battered and formerly battered women. The ANDVSA has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services.

The **Arizona Coalition Against Domestic Violence (AzCADV)** is a non-profit organization representing domestic violence victims and programs across Arizona. AzCADV has nearly 25 years of experience in assisting victims when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for domestic violence victims who ask for help through a protective order. Protective orders, when properly enforced, can have tremendous value to victims and their families, offering safety and the full power of the court in dealing with violators. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services. When there is no consequence for the perpetrator who violates a protective order, the status of the victim and the status of the courts are demeaned and denigrated. AzCADV continuously advocates for improvements to Arizona's protective order statute and the enforcement thereof.

The **Arkansas Coalition Against Domestic Violence (ACADV)** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The ACADV has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services.

The **California Alliance Against Domestic Violence (CAADV)** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The CAADV has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also witnessed the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services. Currently, we are serving on a task force of the Attorney General of California looking at issues related to protective orders and how to strengthen the efficacy of these orders.

The **Connecticut Coalition Against Domestic Violence, Inc. (CCADV)** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. CCADV has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protection orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services. In Connecticut we have worked diligently with our law

enforcement community to enforce protective orders meant to keep victims and children safe.

The **D.C. Coalition Against Domestic Violence (D.C.C.A.D.V.)** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The D.C.C.A.D.V. has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services. Our current collaborative project entitled Victim Informed Prosecution has demonstrated the increased efficacy of protection orders when combined with intensive advocacy to enhance the safety and welfare of battered women and their children.

The **Delaware Coalition Against Domestic Violence (DCADV)** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The DCADV has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. Delaware's order of protection legislation

provides a broad range of relief for victims of domestic violence and is seen as an effective tool in helping victims attain safety and security in the First State. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services.

Dwa Fanm is a non-profit organization representing domestic violence survivors. We have extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive impact that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. And we have seen the impact protective orders have had on men, in reducing recidivism and even in making help available.

The **Florida Coalition Against Domestic Violence** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The Florida Coalition Against Domestic Violence has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services. In November of 1997, the Florida

Coalition Against Domestic Violence created a legal clearinghouse of attorneys to represent victims and help them obtain permanent orders of protection. Our efforts to protect domestic violence victims and their children are futile if law enforcement fails to respond to violations of protection orders.

The **Georgia Coalition Against Domestic Violence** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The Georgia Coalition Against Domestic Violence has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services. The State of Georgia has legislated that perpetrators who are subject to protective orders, and/or convicted under the Family Violence Act, must complete a twenty-four week batterer intervention program. The Georgia Coalition Against Domestic Violence has five pilot sites working to develop compliance measures to insure compliance with these orders.

The **Hawaii State Coalition Against Domestic Violence** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The Hawaii State Coalition Against Domestic Violence has extensive expertise on the physical, emotional and economic dangers women and theft families face when they stand up to their batterers in a court of law.

We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services. One of our most recent successes is implementing HB 2024, which Governor Linda Lingle signed into law on April 15, 2004. This bill prohibits an offender from transferring ownership of any firearms while a protective order is in effect. It mandates that any firearms owned by the offender be transferred directly to police, instead of a family member of friend. As a result of this new legislation, we look forward to seeing victim safety increase in the years to come.

The **Idaho Coalition Against Sexual and Domestic Violence** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The Coalition has extensive expertise on the physical, emotional, and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services.

The **Illinois Coalition Against Domestic Violence (ICADV)** is a nonprofit organization founded in 1978 with particular focus on eliminating domestic abuse in the State of

Illinois, emphasizing women and their dependent children. ICADV also provides, through its 52 member organizations, services to the victims of domestic violence, crisis telephone counseling, temporary shelter for the victim and dependent children, peer and professional counseling, children's services, legal advocacy, assistance obtaining orders of protection, and referral to community resources.

Since 1978, the experience of ICADV has shown that swift criminal justice response to domestic abuse sends a clear message to offenders that their behavior is illegal. Law enforcement departments, the courts, and probation departments all have a role to play in upholding the laws that were designed to keep victims safe and make offenders accountable. The more rapidly violators of the law are dealt with, the less likely it is that violators will become repeat offenders. This is good for the victim and the offenders, and saves vital economic resources for communities because they do not have to spend dollars on recidivist offenders.

An order of protection is a significant tool that may be used to protect a victim and the victim's dependent children from further domestic abuse. However, when the agencies legally mandated to enforce the law do not do their job, the result is all offenders know that violating the law is sanctioned by the criminal justice system and victims are no longer safe. Offenders are much more likely to violate the law repeatedly because they know that their violations are not taken seriously by the only system that is capable of holding them accountable for their illegal acts. The result of the cavalier behavior of some criminal justice systems is the murder of victims and their children.

ICADV has an interest in this case because of our concern that law enforcement needs a clear message that they must follow the law by arresting violators of court protective orders. Without arrest, the criminal justice system

facilitates homicides; with arrest, it practices homicide prevention.

The **Indiana Coalition Against Domestic Violence, Inc.** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The Indiana Coalition Against Domestic Violence, Inc. has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services. The Indiana Coalition Against Domestic Violence has actively participated in the recodification of protective order laws in Indiana to narrow the focus of orders thus increasing safety for battered women and children. Since the recodificiation of protective order laws, domestic violence victims have been granted greater protections by the courts and better enforcement of orders by law enforcement.

The **Iowa Coalition Against Domestic Violence (ICADV)** is a non-profit organization, incorporated in the state of Iowa in 1985. ICADV provides educational and technical assistance to the domestic violence programs across Iowa, and also acts on a statewide and national level to promote public policy and legislative issues on behalf of battered women and their children. ICADV's purpose is to eliminate personal and institutional violence against women through support to programs providing safety and services to battered women and their children. ICADV recognizes that

unequal power contributes to violence against women. Therefore, ICADV advocates social change legal and judicial reform, and the end to all oppression. Protective orders often play an integral role in the ability of a woman to leave safely. If an individual cannot depend on the enforcement of an order, it just acts as another roadblock to compromise her safety and empowers the batterer.

The **Kansas Coalition Against Sexual and Domestic Violence (KCSDV)** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. KCSDV has extensive expertise on the physical, emotional and economic dangers women and their families face when they challenge their batterers in a court of law. This organization and its member programs work closely with courts, legislators, law enforcement agencies, prosecutors, and the media across the state to provide a more effective network that will protect battered women seeking help through a protective order. KCSDV and its member programs believe that protective orders positively impact the safety of battered women and their children, especially when enforced by trained law enforcement officers and prosecutors. KCSDV also believes that protective orders have a positive effect on perpetrators of domestic violence, including reducing recidivism and providing linkages with batterer intervention services.

KCSDV has participated in a Victim Access Committee convened by the Kansas Supreme Court that will significantly improve access to protective orders in Kansas. Additionally, KCSDV is conducting a statewide safety and accountability assessment of the protective order process in Kansas. This project will help identify where safety for the victim and accountability of the perpetrator are being adequately addressed, and where improvements are needed.

The **Kentucky Domestic Violence Association (KDVA)** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The KDVA has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services. Specifically, since 1996 the KDVA has worked on multiple projects to increase the enforcement and effectiveness of protective orders across jurisdictional lines.

The **Louisiana Coalition Against Domestic Violence (LCADV)** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. LCADV has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services. With the successful development of the Louisiana Protection Order Register, administered through the Offices of the Louisiana

Supreme Court, our state has seen tremendous growth both in the number of petitioners as well as the number of arrests for violation of orders. Domestic violence programs across the state report that the protection order is a vital and important option for thousands of battered women seeking safety from their abusers.

The **Maine Coalition to End Domestic Violence (MCEDV)** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The MCEDV has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive impact that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. And we have seen the impact protective orders have had on men, in reducing recidivism and even in making help available.

The **Maryland Network Against Domestic Violence** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The Maryland Network Against Domestic Violence has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive impact that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including

BEST AVAILABLE COPY

reducing recidivism and providing linkages with batterer intervention services.

Jane Doe, Inc. -- Massachusetts Coalition against Sexual Assault and Domestic Violence (JDI) is the statewide membership coalition of nearly 60 domestic violence programs and rape crisis centers. The mission of JDI is to bring together organizations and people committed to ending domestic violence and sexual assault. JDI advocates for responsive public policy, raises awareness, and supports its member organizations to provide comprehensive prevention and intervention services. In keeping with its mission, JDI has an interest in removing barriers that limit or deny a domestic violence survivor's access to safety and justice. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services. A study released November 1, 2004, by the Commissioner of Probation found that the intensity of supervision is a critical determinant of success -- 62% of those under probation supervision successfully completed a certified batterer intervention program compared to 30% without probation supervision who completed the program. Offenders who completed a certified batterer intervention program were least likely to have a subsequent arraignment of any kind (47%), an arraignment for a subsequent violent offense (37%) or for a subsequent restraining order violation (17.4%).

JDI is extremely concerned about this case. The Court's answer to both questions affect state law and constitutional safeguards that determine the future of national efforts to provide safety and life saving services to victims of domestic violence.

The **Michigan Coalition Against Domestic and Sexual Violence (MCADSV)** is a nonprofit organization representing domestic violence and sexual assault programs. For over twenty-five years, MCADSV has worked closely with courts, legislators, the police, prosecutors, and the media and others to provide more effective remedies for victims of domestic violence and sexual assault. In the course of our work, we have actively advocated for improving the options for battered women who seek increased safety through obtaining protective orders. We have seen first-hand the positive effects that protective orders have provided in restoring survivors' safety, autonomy and confidence. We have also seen that protective orders can have important effects on perpetrator behavior, including reducing recidivism and providing impetus to seek batterer intervention services.

The **Minnesota Coalition for Battered Women** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The Minnesota Coalition for Battered Women has extensive expertise on the physical, emotional and economic dangers women and their children face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective safety net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors, have had on women in restoring their safety and ultimately their lives. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services. We are currently collaborating on a project to strengthen arrest, prosecution, enforcement of protection orders, and legal system accountability on two

Native American reservations and in three Minnesota counties.

The **Mississippi Coalition Against Domestic Violence (MCADV)** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. MCADV has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive impact that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services. The failure to enforce a protective order can be catastrophic, as seen in the case before the Court. Experience has taught the MCADV that when a victim of family violence feels their protective order will be enforced, they are more successful at rebuilding their lives than someone who lives in constant fear because they are not confident that the police will act if the protective order is violated. By enforcing orders of protection, law enforcement officers are not only fulfilling their legal obligation, they are also helping to break the cycle of violence. MCADV trains law enforcement officers across the state in an effort to make sure that all victims can feel secure that their protective orders will be enforced.

The **Missouri Coalition Against Domestic Violence (MCADV)**, incorporated in 1980, is a non-profit membership organization of 91 Missouri domestic violence programs that provide services to women and children victimized by domestic violence. MCADV has extensive expertise addressing the physical, emotional and economic

dangers women and their families experience in courts of law when seeking safety and protection, as well as accountability from their batterers. MCADV works closely with courts, legislators, law enforcement, prosecutors, and a wide variety of community services and institutions to provide education, public policy, and adequate and reasonable procedures and processes to achieve effective protections for battered women. A key component of that work is to ensure access to, and enforcement of, Orders of Protection. For more than 20 years, it has been evident through the work of MCADV and all of its member programs that Orders of Protection have dramatically increased the safety and well being of individual battered women and their children. These protective orders also have been effective in providing sanctions and accountability for offenders, while providing crucial tools for those working in law enforcement and the court system. MCADV has worked on statewide projects for more than a decade with the statewide court systems, judicial organizations, law enforcement and prosecution systems to increase the effectiveness of Orders of Protection through training, statutory change, enhancements to Order registries and other data sharing systems between law enforcement and the courts.

The **Montana Coalition Against Domestic and Sexual Violence (Montana Coalition)** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The Montana Coalition has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective

orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services. We are training law enforcement throughout Montana on the importance of Full Faith and Credit as it applies to protective orders. The law enforcement agencies we have trained to date, including tribal and rural law enforcement, have been extremely positive about the importance of this training as it applies to victim and officer safety. We believe our training has had such a positive reception largely due to a recent Montana Supreme Court decision that found a rural Sheriff and the county he represents liable in a negligent death lawsuit filed by the heirs of a woman who was killed by her abusive husband. In that case, the Sheriff and his deputies had been called to the family residence on numerous occasions during which domestic disputes were in process, and which included firearms, and on all occasions the Sheriff and his deputies failed to arrest the alleged perpetrator, confiscate the firearm or provide the alleged victim with notice of her rights under the law. The successful civil lawsuit against the Sheriff and county in this case has served as a "wake-up" call to other law enforcement agencies, emphasizing to them the importance of their duty to protect victims of domestic violence by all legal means available, including the issuance, honoring and enforcement of orders of protection.

The **National Center on Domestic and Sexual Violence (NCDSV)** is a non-profit organization that provides technical assistance and training on issues of domestic and sexual violence. The NCDSV has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with many state and national organizations to provide increased knowledge and skills for

better community response to victims and perpetrators of domestic and sexual violence. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services.

The **Nebraska Domestic Violence Sexual Assault Coalition (NDVSAC)** is a non-profit statewide organization representing Nebraska's 22 domestic violence programs and individual battered and formerly battered women. NDVSAC has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protection order. We have seen first-hand the positive effects that protection orders, the police and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protection orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services.

The **Nevada Network Against Domestic Violence (NNADV)** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. NNADV has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for ~~help~~ through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence.

We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services. In September 2001, NNADV, in collaboration with the Supreme Court of Nevada and the Office of the Attorney General, published a series of findings and recommendations for improved protection order practice for state courts throughout Nevada. For a period of three months, the Nevada Statewide Court Monitoring Project observed 1113 protection order hearings, devoting more than 211 hours of actual in-court observation time to this task. The data that NNADV collected during the protection order phase of this project reinforced its longstanding belief that effective enforcement of protection orders by law enforcement is crucial for the safety and well being of battered women and their children.

The **New Hampshire Coalition Against Domestic and Sexual Violence** is a nonprofit organization that has represented domestic violence programs and individual battered and formerly battered women since 1977. The New Hampshire Coalition Against Domestic and Sexual Violence has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services.

The **New Jersey Coalition for Battered Women (NJCBW)** is a non-profit organization representing domestic violence programs and individual battered and formerly

battered women. The NJCBW has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services.

The **New Mexico Coalition Against Domestic Violence (NMCADV)** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The NMCADV has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services. The few nationwide studies that have examined the effectiveness of Orders of Protection have found that they are useful in reducing intimate partner violence. New Mexico has continued to work to increase the effectiveness of protective orders by developing standard forms, training law enforcement, and addressing full faith and credit/comity with the pueblos and tribal lands found within our State borders.

The **New York State Coalition Against Domestic Violence** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The New York State Coalition Against Domestic Violence has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services. The efficacy and value of orders of protection is widely corroborated in New York State ("NYS") through the findings of the nationally recognized NYS Probation Domestic Violence Project, the NYS Model Policy for Counties (1998), the Final Report to the Governor by the NYS Commission on Domestic Violence Fatalities (1997), the Final Report to the Governor and the Legislature on NYS Mandatory Arrest Provisions (2001), the emphasis on the role of the order of protection in the development of NYS Integrated Domestic Violence Courts, and a demonstrated commitment by the Legislature and related state agencies to work together for necessary enhancements of this vital tool. We emphatically concur with these findings.

The **North Carolina Coalition Against Domestic Violence (NCCADV)** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. NCCADV has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to

their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services.

The **North Dakota Council on Abused Women's Services (NDCAWS)** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The NDCAWS has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services. We have worked extensively with the North Dakota Supreme Court on developing standardized protection orders, full faith and credit issues, the certification of court advocates, and guidelines for court ordered visitation. We also work intensely with law enforcement statewide on policy issues relating to the enforcement of protection orders.

The **Ohio Domestic Violence Network** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The Ohio

Domestic Violence Network has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services. The Ohio Domestic Violence Network is a member of the Supreme Court of Ohio Domestic Violence Advisory Committee. This Committee has successfully worked with the Supreme Court to develop and implement standardized protection order forms for the courts in Ohio, resulting in enhanced consistency in protection order remedies for victims of domestic violence. In 2003, the domestic relations courts in Ohio issued 18,626 civil protection orders to victims of domestic violence.

The **Oklahoma Coalition Against Domestic Violence and Sexual Assault (OCADVSA)** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The OCADVSA has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for

perpetrators, including reducing recidivism and providing linkages with batterer intervention services.

The **Oregon Coalition Against Domestic and Sexual Violence** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The Oregon Coalition has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. The Oregon Coalition works closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive impact that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the impact protective orders have on men, in reducing recidivism and even in making help available.

The **Pennsylvania Coalition Against Domestic Violence (PCADV)** is a not-for-profit organization incorporated in the Commonwealth of Pennsylvania for the purpose of providing services and advocacy on behalf of victims of domestic violence and their minor children. PCADV is a membership organization of 62 shelters, hotlines, counseling programs, safe home networks, legal advocacy projects, and transitional housing projects for battered women and their dependent children in the Commonwealth. For over 28 years, PCADV has provided training and technical assistance to domestic violence programs, attorneys, the courts, and law enforcement agencies on issues of domestic violence, including matters related to protection orders. PCADV has seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective

orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services.

The **Rhode Island Coalition Against Domestic Violence (RICADV)** is a non-profit organization representing domestic violence agencies and individual battered and formerly battered women. The RICADV has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services. The RICADV has found that protective orders are a critical safety tool for victims of domestic violence. Last year, 3,445 protective orders were issued in Rhode Island. 69% of these were issued from the State's Family Court and 31% were issued from the District Court.

The **South Carolina Coalition Against Domestic Violence and Sexual Assault (SCCADVASA)** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. SCCADVASA has extensive expertise on physical, emotional and economic dangers women and families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police and prosecutors have had on

women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services. SCCADVASA has been an active participant in the Passport To Safety project, which has resulted in a complete redesign of the forms now used in South Carolina. This has made it increasingly easier for law enforcement officers to recognize protection orders from any state throughout the Southeast and to enforce them with greater effectiveness.

The **South Dakota Coalition Against Domestic Violence and Sexual Assault (SDCADVSA)** is a non-profit organization representing domestic violence and sexual assault programs in the state of South Dakota and on Indian reservations located within the boundaries of the State of South Dakota. We also directly serve individual battered and formerly battered women. SDCADVSA has extensive expertise on the physical, emotional, and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence, and in providing that most simple, but necessary factor – safety. We have also seen the effects of protective orders issued against perpetrators, including decreases in recidivism and as a means of providing linkages with batterer intervention services. Our organization has dedicated many hours to providing law enforcement with free training on domestic violence, and we have successfully supported legislative changes designed to assist law enforcement to more

efficiently serve and enforce protection orders. We believe and our experience shows that protection orders save lives.

The **Tennessee Coalition Against Domestic and Sexual Violence (Coalition)** is a non-profit organization representing domestic violence and sexual assault programs and individual victims of domestic and sexual violence in Tennessee. The Coalition has extensive expertise on the physical, emotional, and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services.

The **Texas Council on Family Violence (TCFV)** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women in Texas and also operates the National Domestic Violence Hotline (NDVH). In this capacity TCFV has extensive expertise at the state and national level on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with Texas courts, legislators, police departments, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police and prosecutors have had on women in restoring their lives and confidence. Anecdotally, we have witnessed that in nearly all cases the issuance and enforcement of protective orders serves as a deterrent to continued abuse and provides

necessary legal protection for victims of domestic violence and their children in the transition to rebuilding lives free of violence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services.

The **Utah Domestic Violence Council (UDVC)** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The UDVC has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. Legal Aid Society of Salt Lake, an organization that represents the most victims in obtaining protective orders in the state, surveys clients three months after receiving their protective orders. 89% of Legal Aid Society clients report "no further violence after obtaining" their protective orders. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services.

The **Vermont Network Against Domestic and Sexual Violence (Vermont Network)** is a non-profit organization representing 16 domestic and sexual violence programs in the state of Vermont. Each of our domestic violence programs is considered an expert in its community on the physical, emotional and economic dangers women and their families face when attempting separation from their batterers. The Vermont Network as a whole is comprised of decades of experience and expertise regarding how the court system responds to women and children who are battered. In

that vein, we train, collaborate, and problem solve with our courts, legislators, law enforcement, prosecutors, and the media in hopes of providing a more effective net of protection for battered women who ask for help through protection orders. It is imperative that those affected by intimate partner violence are able to rely on this type of legal support and protection in an effort to keep them safe and hold their batterers accountable for their actions. What happened to Jessica Gonzales is inexcusable. If women and their children cannot rely on good faith efforts of protection from law enforcement and the courts, then there is little initial legal support we, as advocates, can offer to them. Domestic assault is a crime, and should be recognized as such. Although protective orders cannot ensure a woman's safety, they are often a crucial step in affording a victim of this crime safety and freedom.

The **Virginia Sexual and Domestic Violence Action Alliance (VSDVAA)** is a non-profit organization representing domestic violence and sexual assault programs and individual battered and formerly battered women. VSDVAA has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services.

Virginia conducted a protective order study funded by the Office on Violence Against Women Grants to Encourage Arrest and the Enforcement of Protective Orders. In FY2003,

there were approximately 40,000 protective orders entered into the Virginia State Police database. The study found that protective orders were more prevalent in communities with a population under 150,000. A more in-depth review of 100 local case files involving protective orders found that 28% of protective order respondents had violated a protective order at least once. The same grant funded a statewide annual family violence and intimate partner fatality surveillance project by the Virginia Office of the Chief Medical Examiner. In 2003, of the 410 adult homicide victims, 13% were killed by intimate partners. Of the adult *female* victims, 30% were killed by intimate partners. Protective orders must be enforced to reduce the number of family and intimate partner homicides.

The **Washington State Coalition Against Domestic Violence (WSCADV)** is a non-profit organization, incorporated in the state of Washington. Founded in 1990, WSCADV is a statewide membership organization committed to eradicating domestic violence through advocacy and action for social change. WSCADV's core membership is comprised of domestic violence shelters and advocacy programs statewide that provide services for victims of domestic violence. Founded by domestic violence survivors, the WSCADV was organized to share resources, develop common strategies and strengthen community responses to domestic violence around the state. The core commitment of the WSCADV is to support domestic violence survivors, and emergency shelter and advocacy programs by advocating for laws and public policies that promote safety and justice for domestic violence victims.

WSCADV has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net

of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services. According to a research study at the University of Washington, battered women who obtain permanent protection orders are 80% less likely to be physically assaulted again than those who do not file for such orders. Toward that end, victims of domestic violence should be able to seek legal protection from abuse violence and not have their rights restricted for seeking such protection.

The **West Virginia Coalition Against Domestic Violence (WVCADV)** is a non-profit organization representing licensed domestic violence programs throughout the state. The WVCADV has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. Since 1988, WVCADV has worked closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women in restoring their lives and confidence. Professionals in multiple systems have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services.

The **Wisconsin Coalition Against Domestic Violence (WCADV)** is a non-profit organization, incorporated in the State of Wisconsin. Founded in 1978, WCADV is a statewide membership organization comprised of battered women, formerly battered women, domestic abuse programs and individuals committed to ending domestic violence. The mission of the WCADV is to eliminate domestic violence by

changing societal attitudes, practices and policies about women from diverse groups, their children and violence through education, advocacy and social action.

The WCADV is the only statewide organization in Wisconsin that provides training and technical assistance on domestic violence issues for battered women's advocates, other professionals and community lay people. WCADV actively promotes public policy to protect victims of domestic violence and their children, including policy advocacy to increase efficacy of protective orders. The WCADV has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. WCADV provides training and works closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services.

The **Wyoming Coalition Against Domestic Violence & Sexual Assault** is a non-profit organization representing domestic violence programs and individual battered and formerly battered women. The Wyoming Coalition Against Domestic Violence and Sexual Assault has extensive expertise on the physical, emotional and economic dangers women and their families face when they stand up to their batterers in a court of law. We work closely with courts, legislators, the police, prosecutors, and the media in providing a more effective net of protection for battered women who ask for help through a protective order. We have seen first-hand the positive effects that protective orders, the police, and prosecutors have had on women in

restoring their lives and confidence. We have also seen the effects of protective orders for perpetrators, including reducing recidivism and providing linkages with batterer intervention services.